(1)

No. 95-8736-CFY Title: Larry Osa Ogbomon, Petitioner
v.
United States

Docketed: April 25, 1996 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Jan 8 1996	Brief of petitioner in response to suggestion of mootness filed.
	Jan 8 1996	LODGING consisting of nonrecord documents relating to suggestion of mootness submitted by the Solicitor General and distributed.
	Apr 19 1996	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due June 27, 1996)
	May 24 1996	Order extending time to file response to petition until June 27, 1996.
	Jun 27 1996	Brief of respondent United States filed.
	Jul 11 1996	DISTRIBUTED. September 30, 1996
	Oct 1 1996	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 12, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 10, 1996. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 27, 1996. Rule 29.2 does not apply. SET FOR ARGUMENT January 13, 1997. **********
	Oct 7 1996	Thomas G. Hungar, Esquire, of Washington, D. C., is invited to brief and argue this case as amicus curiae in support of the judgment below.
	Nov 8 1996	Joint appendix filed.
	Nov 8 1996	Brief of petitioner Larry Osa Ogbomon filed.
	Nov 12 1996	Brief amici curiae of American Immigration Lawyers Association, et al. filed.
	Nov 12 1996	Brief amicus curiae of American Bar Association filed.
	Nov 20 1996	Record filed.
	Nov 20 1996	Record filed.
	Nov 25 1996	CIRCULATED.
	Nov 26 1996	Brief of respondent United States filed.
	Dec 9 1996	Brief amicus curiae of Thomas Hungar in support of the judgement below filed.
	Dec 10 1996	Motion of the Acting Solicitor General for divided argument filed.
	Dec 10 1996	Brief amicus curiae of Washington Legal Foundation filed.
	Dec 20 1996	Suggestion of mootness filed by respondent United States.
	Dec 24 1996	Motion of the Acting Solicitor General for divided argument GRANTED. and time allotted for oral argument is as follows: 25 minutes for petitioner, 25 minutes for amicus curiae, 10 minutes for Acting Solicitor General. Counsel for petitioner and amicus curiae appointed by

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Entry	Date	Proceedings and Orders
		this Court are directed to file responses to the suggestion of mootness filed by Acting Solicitor General on Dec. 20, 1996. Responses prepared temporarily under Rule 33.2 of the Rules of this Court, are to be filed with the Clerk and served upon counsel on or before noon, Wednesday, Jan. 8, 1997.
	Dec 27 1996	Reply brief of petitioner Larry Osa Ogbomon (TBP) filed.
	Jan 6 1997	DISTRIBUTED. January 10, 1997 (Page 14)
	Jan 8 1997	Brief of amicus curiae Thomas Hungar in response to the suggestion of mootness filed.
	Jan 9 1997	Reply brief of United States in support of suggestion of mootness filed.
	Jan 10 1997	Writ of certiorari DISMISSED as improvidently granted.

No. 95-8736

Supreme Court, U.S.
FILED
NOV 8 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

LARRY OSA OGBOMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

JOINT APPENDIX

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Petition For Certiorari Docketed April 25, 1996
Certiorari Granted October 1, 1996

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RELEVANT DOCKET ENTRIES

Date	Proceedings
10/19/93	Magistrate's Complaint Larry Osa Ogbomon
11/30/93	ARRAIGNMENT HELD before Magistrate Judge Joel M. Feldman. Case assigned to Judge Orinda D. Evans. PLEA OF NOT GUILTY.
1/18/93	ARRAIGNMENT on change of plea, held before Judge Orinda D. Evans as to Larry Osa Ogbomon (1) count(s)
	PLEA OF GUILTY by Larry Osa Ogbomon (1) count(s) 1. . . . sentence set 3:30 3/23/94 for Larry Osa Ogbomon
4/25/94	Sentencing of Larry Osa Ogbomon (1) count(s) 1.CNT 1: 16 MOS CBOP, FOLLOWED BY 36 MOS SPV'D RELEASE. $50.00 SPECIAL ASSESSMENT. Dfnt remanded to CUSM. Stnd. cond. of Spv'n as set forth in J/C
7/21/94	TRANSCRIPT filed as to defendant Larry Osa Ogbomon for dates of 04/20/94.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
V.	:	CRIMINAL INDICTMENT
Larry Osa Ogbomon, a/k/a Paul Edegba	:	No. 1:93-CR

THE GRAND JURY CHARGES THAT:

COUNT ONE

On or about the 21st day of October, 1993, in the Northern District of Georgia, the Defendant, Larry Osa Ogbomon, a/k/a Paul Edegba, an alien who had been previously arrested and deported from the United States pursuant to law, and who after such date had not received the consent of the Attorney General of the United States to reapply for admission to the United States, was found in the United States in the Northern District of Georgia, in violation of Title 8, United States Code, Section 1326.

/s/ Joe D. Whitley /by MB
JOE D. WHITLEY
UNITED STATES ATTORNEY

/s/ J. Dan Pelletier
J. DAN PELLETIER
SPECIAL ASSISTANT U.S. ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	)	
PLAINTIFF,	)	DOCKET NO. 1:93-CR-493-ODE
VS.	)	
LARRY OGBOMON,	)	
DEFENDANT.	)	

SENTENCING HEARING - April 20, 1994

* * *

[2] (ATLANTA, FULTON COUNTY, GEORGIA, WEDNESDAY AFTERNOON APRIL 20, 1994, IN OPEN COURT.)

- - -

THE COURT: GOOD AFTERNOON.

COUNSEL: GOOD AFTERNOON.

THE COURT: LADIES AND GENTLEMEN, IN THE CASE OF UNITED STATES VERSUS OGBOMON, THIS IS THE SENTENCING HEARING. THERE ARE NO OBJECTIONS TO THE PRESENTENCE REPORT. MR. SPENCER, WOULD YOU LIKE TO BE HEARD?

MR. SPENCER: YES, YOUR HONOR. WE HAVE ONE - NOT OBJECTION, BUT CORRECTION FOR THE RECORD, JUDGE, AND IT GOES REALLY TOWARDS ATTITUDE, AND THAT'S WHY I WANTED TO MAKE IT.

PARAGRAPH 7, YOUR HONOR, IT SAYS IN THE ANONYMOUS LETTER THAT LED TO MR. OGBOMON'S ARREST, IT STATED SOMETHING ABOUT MR. OGBOMON CLAIMING THAT HE WAS GOING TO COMMIT BIGGER CRIMES TO GET BACK AT HIM BEING IN JAIL. WE ALWAYS DENIED THAT. WE WANTED TO LET THE COURT KNOW THAT, JUDGE, SO THE COURT COULD CONSIDER THAT FOR WHAT IT IS WORTH, BUT OTHER THAN THAT, WE DON'T HAVE ANY OBJECTIONS.

I THINK THE GOVERNMENT HAS A MOTION, SO I WILL SIT DOWN AT THIS TIME.

THE COURT: MR. PELLETIER?

MR. PELLETIER: AS I TOLD YOU AT THE PLEA, THE GOVERNMENT EXPECTED TO BE MAKING A 5K1 MOTION AT THE SENTENCING, AND WE WILL BE REQUESTING A TWO-LEVEL REDUCTION [3] BASED ON COOPERATION. THE INFORMATION HE GAVE THE GOVERNMENT DID RESULT IN THE ARREST OF ANOTHER INDIVIDUAL THAT WAS ILLEGALLY IN THE UNITED STATES. SO, AT THIS TIME THE GOVERNMENT WOULD MAKE A MOTION THAT THE COURT DEPART DOWNWARD TWO LEVELS TO REFLECT HIS COOPERATION.

MR. SPENCER: IN RESPONSE TO THAT, YOUR HONOR, WE WOULD JUST ASK THAT THE COURT CONSIDER THREE OR FOUR LEVELS, TWO OR THREE EXTRA LEVELS IN ADDITION TO – I MEAN ONE OR TWO ADDITIONAL LEVELS IN ADDITION TO THAT WHICH THE GOVERNMENT RECOMMENDED BECAUSE MR. OGBOMON APPARENTLY MADE SOME

FURTHER EFFORTS THAT JUST DID NOT CAUSE AN ARREST, BUT DID ATTEMPT TO ASSIST GOVERNMENT IN THIS MATTER.

THE COURT: I DON'T SEE THE DEPARTURE MATTER REFERENCED IN THE PLEA AGREEMENT.

MR. PELLETIER: YOUR HONOR, I BELIEVE WE DID MENTION THAT AT THE PLEA, AND IF MEMORY SERVES ME CORRECTLY, I HAND WROTE IT ON THE BOTTOM OF THE NEGOTIATED PLEA, AND ADVISED THE COURT THAT I EXPECTED TO BE MAKING THAT MOTION.

THE COURT: I DO NOT RECALL. I MEAN I CAN'T SIT HERE AND SAY I DON'T REMEMBER YOUR TELLING ME THAT, BUT I DON'T SEE IT IN THE PLEA AGREEMENT, HANDWRITTEN OR OTHERWISE.

MR. SPENCER: I SEEM TO REMEMBER, YOUR HONOR, THAT MR. PELLETIER AND I, I THINK, HAVE HAD THREE OF THESE CASES, AND I DO REMEMBER THIS BEING THE CASE WHERE THERE WAS AN ISSUE ABOUT THE DEPARTURE, AND TO NOT DELAY THE PROCEEDINGS, [4] MR. PELLETIER AT THE TIME WAS TO WRITE IN THE PLEA AGREEMENT THAT HE EXPECTED A 5K1 MOTION TO BE MADE IN THIS MATTER, AND THAT WAS PART OF OUR UNDERSTANDING.

MR. PELLETIER: THAT WAS DONE IN OPEN COURT, AND I DON'T KNOW IF YOU HAVE THE ACTUAL COPY THAT WE FILED AT THE TIME.

THE CLERK: I HAVE GOT THE ORIGINAL. THAT WOULD HAVE BEEN THE COPY THAT HE PROVIDED, BUT NOT THE ORIGINAL.

THE COURT: WELL, I DON'T HAVE IT. MY CLERK HAS JUST HANDED ME THE COPY THAT IS IN THE FILE THAT IS IN THE COURTROOM.

NOW, IF BOTH COUNSEL ARE TELLING ME AS OFFICERS OF THIS COURT THAT YOU SPECIFICALLY REMEMBER THIS BEING BROUGHT UP, I'LL RELY ON WHAT YOU ARE TELLING ME, BUT IF THERE IS SOME AMBIGUITY ABOUT THIS, I WANT TO CHECK.

MR. PELLETIER: IF I CAN HAVE JUST A MOMENT TO CONFER.

THE COURT: WE CAN TAKE A SHORT RECESS. THIS WOULD BE VERY QUICK TO RUN THIS MATTER DOWN.

MR. PELLETIER: ALL RIGHT.

MR. SPENCER: THAT'S FINE.

MR. PELLETIER: IF WE CAN TAKE ABOUT FIVE MINUTES.

THE COURT: LET'S DO THAT.

(RECESS TAKEN)

THE COURT: OKAY. LADIES AND GENTLEMEN, THE [5] TRANSCRIPT OF THE PLEA HEARING INDICATES THE SUBJECT OF THE DEPARTURE WAS DISCUSSED AT THAT TIME. COUNSEL SAID YOU ANTICIPATED THERE WOULD BE A MOTION, AND I DIRECTED YOU TO PUT IT IN THE WRITTEN PLEA

AGREEMENT. APPARENTLY IT WAS PUT ON THE ORIGINAL OF THE PLEA AGREEMENT, BUT DID NOT MAKE IT TO ANY OF THE COPIES.

ANYTHING FURTHER ON THE MOTION FOR A DEPARTURE?

MR. SPENCER: NOTHING, YOUR HONOR.

THE COURT: I'LL GRANT THE MOTION, AND IT WILL BE A TWO-LEVEL DEPARTURE.

ANYTHING FURTHER CONCERNING THE SENTENCE?

MR. SPENCER: ONLY THAT AS PART OF THE PLEA AGREEMENT, YOUR HONOR, THE GOVERNMENT WOULD RECOMMEND THE LOWER END OF THE GUIDELINE FOR A SENTENCE, AND WE THINK THAT IS THE APPROPRIATE SENTENCE IN THIS MATTER.

THE COURT: IS THAT YOUR RECOMMENDATION?

MR. PELLETIER: THAT'S CORRECT, YOUR HONOR, AND THAT WAS PART OF THE PLEA AGREEMENT. I THINK IT WAS A BARGAINED FOR EXCHANGE.

THE COURT: MR. OGBOMON, WOULD YOU COME ON UP TO THE PODIUM, PLEASE? WOULD YOU LIKE TO MAKE A STATEMENT?

THE DEFENDANT: YES, MA'AM. YOUR HONOR, DESPITE SUFFERING AND HARD TIMES AND GOING THROUGH A CRISIS AND LOSING THAT

SENT ME HOME, AND I GO BACK TO NIGERIA, AND FOR THAT TO COME BY IS LIKE FINDING A REASON FOR FINDING JUSTIFICATION [6] FOR, BUT I NOW HAVE HAD ENOUGH, AND I SUFFER GREATLY FOR BEING IN JAIL, AND I WANT YOU TO CONSIDER AND GIVE ME WHAT YOU NEED TO DO, AND I GO BACK AND BE MORE PRODUCTIVE AND TRY TO TURN AROUND, AND I PROMISE I WON'T COME BACK AGAIN, SO YOU WON'T HAVE TO SEE ME. THANK YOU.

THE COURT: ANYTHING FURTHER, COUNSEL?

MR. PELLETIER: NOTHING FROM THE GOVERNMENT.

THE COURT: MR. OGBOMON, YOU ARE HEREBY COMMITTED TO THE CUSTODY OF THE BUREAU OF PRISONS FOR A PERIOD OF 16 MONTHS. IT IS ORDERED THAT YOU PAY THE UNITED STATES A SPECIAL ASSESSMENT OF $50.

ON RELEASE FROM IMPRISONMENT, YOU SHALL BE PLACED ON SUPERVISED RELEASE FOR A PERIOD OF THREE YEARS.

WITHIN 72 HOURS OF RELEASE FROM THE CUSTODY OF THE BUREAU OF PRISONS, YOU SHALL REPORT IN PERSON TO THE PROBATION OFFICE IN THE DISTRICT TO WHICH YOU ARE RELEASED. WHILE ON SUPERVISED RELEASE YOU SHALL NOT COMMIT ANOTHER FEDERAL, STATE, OR LOCAL CRIME. YOU SHALL COMPLY WITH THE STANDARD CONDITIONS THAT HAVE BEEN ADOPTED BY THIS

COURT, AND YOU SHALL COMPLY WITH THE FOLLOWING ADDITIONAL CONDITIONS:

FIRST, YOU SHALL PAY THE SPECIAL ASSESSMENT IMPOSED BY THIS JUDGMENT THAT REMAINS UNPAID AT THE COMMENCEMENT OF THE PERIOD OF SUPERVISED RELEASE.

SECONDLY, ON COMPLETION OF THE IMPRISONMENT PORTION OF YOUR SENTENCE, YOU SHALL BE DEPORTED FROM THE UNITED STATES [7] PURSUANT TO 18 UNITED STATES CODE, SECTION 3583(D). YOU SHALL TAKE NO ACTION TO RESIST AN ORDER OF DEPORTATION. YOU SHALL NOT RETURN TO THE UNITED STATES DURING THE PERIOD OF SUPERVISED RELEASE. YOU SHALL BE DETAINED IN THE CUSTODY OF THE IMMIGRATION AND NATURALIZATION SERVICE PENDING YOUR DEPORTATION FROM THE UNITED STATES.

ANY EXCEPTIONS?

MR. SPENCER: WE OBJECT TO THE COURT'S IMPOSITION OF DEPORTATION.

THE COURT: ANYTHING FURTHER?

MR. PELLETIER: NO.

THE COURT: THAT'S ALL. THANK YOU.

- - -

(PROCEEDINGS CONCLUDED.)

UNITED STATES DISTRICT COURT
Northern District of Georgia

UNITED STATES OF AMERICA	:	Case Number: 1:93-CR-493-01-ODE
v.	:	
LARRY OGBOMON	:	
Defendant.	:	

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, LARRY OGBOMON, was represented by Gary Spencer.

The defendant pled guilty to count(s) one. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Count Number(s)
8 USC 1326	Unlawfully Entering or Remaining in the United States	One

As pronounced on April 20, 1994, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $50.00, for count(s) one, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days

of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 25 day of April, 1994.

/s/ Orinda D. Evans,
United States
District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of SIXTEEN (16) MONTHS.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to

_____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy U. S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own or possess a firearm or destructive device.

4. The defendant shall depart the United States when ordered to do so by the Immigration and Naturalization Service. The defendant shall take no action to appeal or resist any order if deportation by the Immigration and Naturalization Service and if deported, shall not reenter the United States during the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8606
Non-Argument Calendar

D. C. Docket No. 1:93-cr-493

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY OSA OGBOMON
a/k/a Paul Egegra,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(May 5, 1995)

Before KRAVITCH, ANDERSON and BARKETT, Circuit Judges.

PER CURIAM:

Appellant pled guilty of violating 8 U.S.C § 1326, reentering the United States after being deported. The district court sentenced appellant to 16 months incarceration, followed by a three-year term of supervised release. As a condition of supervised release, the district court ordered appellant deported from the United States and detained by the Immigration Service until deported. Appellant urges that the district court lacked authority to order his deportation without affording him recourse to

the procedures under the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101 *et seq.*[1]

In *United States v. Chukwura*, 5 F.3d 1420, 1423-24 (11th Cir. 1993), *cert. denied*, 115 S.Ct. 102 (1994), we held that the district court could order deportation as a condition of supervised release without recourse through the procedures for an administrative hearing and judicial review under the INA. Pointing to First Circuit authority which apparently held contra, *United States v. Sanchez*, 923 F.2d 236, 237 (1st Cir. 1991), both appellant and appellee now urge that *Chukwura* was wrongly decided. However, we are not free to overrule *Chukwura*. Only a decision by this court sitting en banc or by the United States Supreme Court can overrule a prior panel decision. *United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir. 1986). Therefore, we affirm appellant's sentence. The parties, however, are free to petition for rehearing en banc. *See* Fed.R.App.P. 35 and 40.

AFFIRMED.

---

[1] Appellant also argues that the district court erred in failing to make findings of fact regarding his deportability, and failing to consider the possibility of suspension of deportation. However, as appellant did not raise these issues before the district court, he has failed to preserve them for review. *United States v. Prichett*, 898 F.2d 130, 131 (11th Cir. 1990).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8606

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY OSA OGBOMON
a/k/a/ Paul Egegra,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: KRAVITCH, ANDERSON and BARKETT, Circuit Judges.

PER CURIAM:

( ) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

(✓) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit

Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
UNITED STATES CIRCUIT JUDGE

Supreme Court of the United States

No. 95-8736

Larry Osa Ogbomon,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 12, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 10, 1996. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 27, 1996. Rule 29.2 does not apply.

October 1, 1996

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(5)

Supreme Court, U.S.
FILED
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No. 95-8736

In The

Supreme Court of the United States

October Term, 1996

LARRY OSA OGBOMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR PETITIONER LARRY OSA OGBOMON

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QUESTION PRESENTED

Whether a district court has authority under 18 U.S.C. § 3583(d) to summarily deport a defendant who appears before the court for sentencing without affording the alien defendant the full range of protections and benefits guaranteed by Congress notwithstanding Title 8.

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OPINION BELOW

The opinion of the court of appeals is unreported. J.A. 15-16.

JURISDICTION

The judgment of the court of appeals was entered May 5, 1995. A timely petition for rehearing was denied on January 22, 1996. J.A. 17. The petition for a writ of certiorari was filed on April 22, 1996, and was granted on October 1, 1996. The jurisdiction of this court is authorized by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. § 3583(d) is reproduced at App., *infra*.

STATEMENT

1. Petitioner originally arrived in this country in 1987 pursuant to a tourist visa. Presentence Report ("PSR") ¶4. His status was adjusted to that of a conditional resident alien on September 27, 1988. *Id.*

On February 14, 1991, Petitioner was convicted in DeKalb County, Georgia, of various felony offenses. He received five years probation with a condition that he not reenter the United States except through the Immigration & Naturalization Service ("INS") and under the name of Larry Ogbomon. PSR ¶5.

On June 10, 1991, Mr. Ogbomon entered a guilty plea in the United States District Court for the Northern District of Georgia to two counts of bank fraud. On August 30, 1991, he was sentenced to the custody of the Bureau of Prisons for 14 months. Upon release from imprisonment, Petitioner was placed on supervised release for three years with the special condition that he depart from the United States within four days. PSR ¶6.

Petitioner was released from the Federal Detention Center in Oakdale, Louisiana, on October 15, 1991, into the custody of the INS. INS records reflect that Petitioner was deported from the United States on November 20, 1991. His deportation was based on his conviction for multiple counts of fraud and forgery in DeKalb County, Georgia. *Id.*

Petitioner pled guilty in the instant case to illegal reentry after deportation, in violation of 8 U.S.C. § 1326. J.A. 1, 2. As part of his sentence, the district court ordered that he be deported and take "no action to appeal or resist any order of deportation by the Immigration & Naturalization Service[.]"[1] J.A. 12. Petitioner objected to the judicial order of deportation. J.A. 9.

2. The court of appeals affirmed, finding itself bound by its prior decision in *United States of Chukwura*, 5 F.3d 1420 (11th Cir. 1993), *reh'g denied*, 14 F.3d 60 (11th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 102 (1994). In *Chukwura*, the

[1] The Petitioner was sentenced to sixteen (16) months imprisonment, to be followed by three (3) years of supervised release, during which time he was to remain outside the United States. J.A. 10-14.

Eleventh Circuit held that the plain language of 18 U.S.C. § 3583(d) authorized a district court to order deportation as a condition of supervised release. *Chukwura*, 5 F.3d at 1423. "The language is unequivocal and authorizes district courts to order deportation as a condition of supervised release, any time a defendant is subject to deportation." *Id.* Petitioner sought rehearing *en banc* in the instant case, but said petition was denied on January 22, 1996. J.A. 17-18. In seeking certiorari before this Court, the Solicitor General joined Mr. Ogbomon in arguing that the district court had overstepped its authority in ordering deportation.

Subsequent to the denial of relief to the Petitioner, the Eleventh Circuit again discussed the question of whether a district court has the authority to order deportation pursuant to supervised release. *United States v. Oboh*, 65 F.3d 900 (11th Cir.), *vacated*, 70 F.3d 87 (11th Cir. 1995) ("*Oboh I*"). A different panel of the Eleventh Circuit noted that the *Chukwura* decision would have the effect of "permit[ting] district courts to deport any deportable aliens without affording them any procedural safeguards with the exception of those aliens . . . convicted of crimes of moral turpitude or aggravated felonies." *Oboh I*, 92 F.3d at 902.

The Eleventh Circuit, *en banc*, addressed the *Chukwura* holding in light of the contrary decisions of the other circuits. *United States v. Oboh*, 92 F.3d 1082 (1996) (*en banc*) ("*Oboh II*"). In that consolidated appeal, Appellant Mitchel Augustus Bowen pled guilty to a two count information, charging that he violated 8 U.S.C. § 1326, illegal reentry after deportation, and 21 U.S.C. § 844, possession of marijuana. *Oboh II*, 92 F.3d at 1083. As part of his sentence the district court ordered that he be deported as

a condition of supervised release. *Id.* This order was over Bowen's objection to deportation *and his request that INS determine his asylum request. Id.*

Mr. Oboh pled guilty to two counts of producing false identification documents in violation of 18 U.S.C. § 1028(a)(1). *Id.* As a condition of his supervised release the district court ordered that the Government deport Mr. Oboh pursuant to 18 U.S.C. § 3583(d). Mr. Oboh objected, arguing that the PSR did not include a recommendation for deportation or any information regarding his immigration status, other than his place of birth (Ibadan, Nigeria) and the date on which he immigrated to the United States (1974). *Id.* The opinion does not reflect that the district court provided a forum for either Mr. Oboh or Mr. Bowen to defend against deportation. In a 7-5 decision, a majority reaffirmed the *Chukwura* holding. *Id.*

The majority again found that the plain language of 18 U.S.C. § 3583(d) authorized the district court to order an alien defendant subject to deportation to be deported as a condition of supervised release. *Oboh II*, 92 F.3d at 1084. The *Oboh II* majority noted that the First[2], Fourth[3], and Fifth[4] Circuits had held that the supervised release statute merely authorized the district court to order the surrender of a defendant to the INS for deportation proceedings in accordance with the Immigration & Nationality Act ("INA"). However, the Eleventh Circuit found

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[2] *United States v. Sanchez*, 923 F.2d 236 (1st Cir. 1991).

[3] *United States v. Xiang*, 77 F.3d 771 (4th Cir. 1996).

[4] *United States v. Quaye*, 57 F.3d 447 (5th Cir. 1995).

that those courts did not take into account other legislative developments, particularly the existence and elimination of judicial recommendations against deportation (See Immigration Act of 1990, Pub.L. No. 101-649, § 505(a)), and 8 U.S.C. § 1252a(d), which allows a district court to order deportation of alien defendants upon the request of the U.S. Attorney with the concurrence of the Commissioner of the INS. *Oboh II*, 92 F.3d at 1087.[5]

The majority also recognized that its "plain meaning" interpretation of § 3583(d) did not provide recourse equal to those procedures under the INA, but that only subsequent congressional action would provide a remedy for that dilemma. *Id.* The dissent would have adopted the approach taken by the other courts of appeal. *Id.* at 1088. First, the dissent thought that the language of § 3583 was ambiguous, in that the section states, in part, that "[t]he court may *provide* . . . that [the defendant] be deported and remain outside the United States, and may *order* that he be delivered to a duly authorized immigration official for such deportation." 18 U.S.C. § 3583(d) (emphasis added). The use of the verb "provide", according to the dissent, was not inadvertent where the term "order" is used in other parts of the same statute, and therefore "provide" was logically interpreted to mean "make provision" for the deportation under the auspices of the INS. *Id.*

The dissent also found that § 3583(d), when interpreted as facilitating the surrender of defendants who are

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[5] The Tenth Circuit has joined the majority of circuits in holding that § 3583(d) does not allow the district court to order deportation. *United States v. Phommachanh*, 91 F.3d 1303 (10th Cir. 1996).

subject to deportation to the INS for deportation proceedings, was consistent with the historical delegation to the Executive Branch from Congress regarding matters relating to immigration. This practice reflects the common understanding that "the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control." *Shaugnessy v. Mezei*, 345 U.S. 206, 210 (1953). The dissent also noted that the INA, in 8 U.S.C. § 1252 and its accompanying regulations, had established procedures to be used by the Attorney General in determining whether an alien who was charged with being deportable under 8 U.S.C. § 1251 was, in fact, deportable. It pointed out that § 1252(b) provides that "the procedures so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section," and that "[in] any case in which an alien is ordered deported from the United States under the provisions of this chapter, or of any other law or treaty, the decision of the Attorney General shall be final." *Oboh II*, 92 F.3d at 1089. Therefore, the referenced deportation in § 3583(d) did not carve out an exception to the Executive Branch's authority over immigration matters. *Oboh II*, 92 F.3d at 1089 (Barkett, J., dissenting). Finally, the dissent found that the background of § 3583(d) supported its interpretation of the statute, finding that the statute it replaced, 18 U.S.C. § 716 (1925), governing the parole of prisoners, provided that

> where a federal prisoner is an alien and subject to deportation the Board of Parole may authorize the release of such prisoner after he shall have become eligible for parole on condition that he be deported and remain outside the United States and all places subject to its jurisdiction, and upon such parole becoming effective said prisoner shall be delivered to the duly authorized immigration official for deportation.

Act of March 2, 1931, ch. 371, 46 Stat. 1469.

On October 1, 1996, this Court granted the writ of certiorari to resolve this issue.

SUMMARY OF THE ARGUMENT

Properly read, 18 U.S.C. § 3583(d) enables the sentencing court to require an alien, who is subject to deportation (a finding that must be made by the INS), to reside outside the United States during the term of supervised release. To effectuate this condition, § 3583(d) permits the district court to order the alien to surrender to an immigration official for deportation proceedings upon the completion of his custodial sentence.

Section 3583(d) does **not** authorize a sentencing court to order an alien to be deported. The Eleventh Circuit is alone amongst the courts of appeal in holding that through § 3583(d) Congress authorized district courts to deport aliens. The Eleventh Circuit's interpretation would create two parallel deportation processes: a civil administrative deportation and a criminal sentencing deportation. All other courts of appeal, that have dealt with this issue have held that § 3583(d) authorizes a district court

only to order an alien to surrender to the INS, which is the interpretation urged by Mr. Ogbomon.

The plain language of § 3583(d), the relevant rules of statutory construction, the statutory antecedents to § 3583, the legislative history, subsequent legislation, and the traditional roles occupied by the Executive and Judicial Branches of government in the context of immigration law all support this interpretation of § 3583.

The plain language of § 3583(d) militates against the Eleventh Circuit's interpretation and supports Petitioner's reading of the statute. The sentencing court is merely authorized to "*provide*" for the deportation of an alien – not to order it. Whereas, all other conditions of supervised release must or can be **ordered**, the district court may only **provide** for deportation in the event that an alien is "subject to deportation." Upon his release from prison, the alien could then be ordered to surrender to an immigration official for such deportation. This distinct choice of two different verbs to describe the district court's authority – "provide" and "order" – cannot be read interchangeably.

Rather than expanding the judiciary's authority, both the structure and the context of § 3583(d) reflects Congress' plain intention merely to provide an option other than the standard term of supervised release – that the alien remain in the district unless allowed to travel elsewhere – in order to allow the INS to effectively carry out a deportation after an appropriate administrative hearing.

In the absence of any indication of contrary congressional intent, the language of § 3583(d) must be read *in*

pari materia with the provisions of the INA. See 2A Sutherland Statutory Construction sections 51.02, 51.05 (Sands 4th Ed. 1984). The determination of whether an alien is "subject to deportation" requires reference to 8 U.S.C. § 1251. These two statutes, 8 U.S.C. § 1251 and 18 U.S.C. § 3583(d), can be read consistently only if the sentencing court's authority is limited to surrendering the alien to INS custody so that a deportation proceeding can be held.

The statutory antecedents to § 3583(d) support reading the statute as merely a recodification of the long-standing authority of the district court to order the surrender of an alien subject to deportation upon the completion of his custodial sentence. While the Eleventh Circuit acknowledged the similarity in the language of the former 18 U.S.C. § 4212 and the current § 3583(d), it ignored the absence of any language in § 3583(d) that indicates that Congress intended to bestow more authority on the district court than it had previously given to the parole commission in § 4212.

Recent amendments to the INA confirm that Congress did not intend § 3583(d) to grant the district courts the authority to deport aliens. These amendments also demonstrate that Congress is capable of being explicit when it wishes to expand the jurisdiction of the judiciary. The Eleventh Circuit in *United States v. Oboh*, 92 F.3d 1082 (11th Cir. 1996) (en banc), concluded that these amendments supported their holding in *United States v. Chukwura*, 5 F.3d 1420 (11th Cir. 1993), *cert. denied*, 115 S.Ct. 102 (1994). But the court does not explain why Congress would create such a detailed method of accomplishing a

judicial deportation if it had already previously granted this same authority more simply in § 3583(d). Furthermore, the new amendment only allows the district court to order deportation when it is requested by the Executive Branch, and both the United States Attorney and the Commissioner of the INS ask the district court to exercise its jurisdiction to do so.

At most the language of the statute is ambiguous, and it therefore is subject to the principle that where there are two interpretations of a deportation law, this Court is required to adopt the interpretation which favors the alien. Here, that principle dictates that Petitioner is entitled to adequate procedural safeguards, which are provided in 8 U.S.C. §§ 1158, 1182(c), 1253(h), 1254(a) and (e), and cannot be summarily deported at sentencing.

The Eleventh Circuit's interpretation of § 3583(d) places the provision in constitutional jeopardy, which is a strong reason to construe the statute as Petitioner proposes. Section 3583(d) would raise equal protection concerns by arbitrarily creating separate classes of aliens who would receive vastly different review and relief. It is highly unlikely that Congress would create a scheme so lacking in uniformity in the deportation laws. Indeed, it would be bizarre to assume that Congress would deprive one small group of aliens from receiving the due process afforded by 8 U.S.C. § 1252b without any explicit language.

Second, Petitioner is not an excludable alien who is arguably entitled to less constitutional protection. Rather, he has entered the United States and is a deportable alien, that is, an alien who is entitled to the procedures and

relief contained in the deportation process, as well as the constitutional protection of due process.

For nearly 200 years, Congress has delegated the authority to enforce the immigration laws to the Executive Branch. While Congress possesses the authority to promulgate laws governing the deportation of aliens, under the Constitution, Congress long ago exercised its constitutional authority by creating the Immigration and Naturalization Service as a part of the Executive Branch under the Attorney General. U.S. Const. art. I, § 8, cl. 4; Alien Act of June 25, 1798. The Attorney General was given "far reaching authority to deport aliens, with elaborately detailed procedures for exercising that authority. *See* generally 8 U.S.C. § 1101-1503." *United States v. Xiang*, 77 F.3d 771, 773 (4th Cir. 1996); Immigration and Nationality Act of 1952, 66 Stat. 182, as amended, 8 U.S.C. §§ 1101 *et seq*. Since 1798, this authority has been delegated exclusively to the Executive Branch, which to the present day continues to retain exclusive authority to initiate an order of deportation against an alien. Frank L. Auerbach, Immigration Laws of the United States 1 (1955); 8 U.S.C. § 1252. The power of the Executive Branch has been zealously guarded against judicial encroachment in the decisions of this Court.

Despite two centuries of consistent legislative and judicial tradition, the Eleventh Circuit has interpreted 18 U.S.C. § 3583(d) as a grant of plenary authority to the judiciary to deport aliens, without so much as notice to the alien being sentenced. The single sentence contained in § 3583(d) cannot sustain the sweeping change in

Congress' historic approach that the court below has assigned it. Accordingly, the decision below should be reversed.

ARGUMENT

The United States Court of Appeals for the Eleventh Circuit has held that a sentencing judge is empowered by 18 U.S.C. § 3583(d) to order an alien deported without an INS deportation hearing or an opportunity to seek relief from deportation. Properly interpreted, 18 U.S.C. § 3583 authorizes a sentencing court merely to anticipate and *provide for* the deportation of an alien who is determined deportable by the INS upon his release from custody as a condition of supervised release, and to provide that the term of supervision be served outside the United States. To effectuate this condition, the sentencing court plainly has authority to order the alien delivered to the INS. This interpretation of § 3583(d), which all courts except the Eleventh Circuit have adopted, is supported by the language of the statute, the rules of statutory construction, the statutory antecedents to § 3583(d), the legislative history, subsequent legislation, and the traditional roles occupied by the Executive and Judicial Branches of government in the context of immigration laws.

I. THE LANGUAGE OF SECTION 3583(d) AND ITS HISTORY, WHEN READ IN THE CONTEXT OF EXISTING IMMIGRATION LAW AS WELL AS SUBSEQUENT LEGISLATION, SHOWS THAT CONGRESS DID NOT CONFER SWEEPING DEPORTATION POWER ON THE SENTENCING COURT

The congressional choice between the words "provide" or "order" decisively shows that § 3583(d) does not grant district courts the jurisdiction to deport aliens. The context of § 3583 and its statutory antecedents further fortify Petitioner's interpretation. Section 3583(d) can only be read *in pari materia* with 8 U.S.C. §§ 1101-1503 by using Petitioner's interpretation. The Eleventh Circuit's interpretation, by contrast, is in direct conflict with both the statutory scheme existing when Petitioner was sentenced as well as the subsequent legislation. Because the statute is at least ambiguous, the construction favoring Petitioner must be adopted. Finally, the Eleventh Circuit's interpretation renders § 3583(d) subject to constitutional attack.

A. The Eleventh Circuit's Construction Of 18 U.S.C. § 3583 Does Violence To The Plain Meaning Of That Section.

Section 3583(d) states:

> [i]f an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States and may order that he be delivered to a duly authorized immigration official for deportation.

18 U.S.C. § 3583(d).

This Court has repeatedly noted that "in all cases involving statutory construction 'our starting point must be the language employed by Congress.' " *Immigration and Naturalization Service v. Phinpathya*, 464 U.S. 183, 189 (1984) (citations omitted). The plain meaning of § 3583 is that aliens who have been found deportable by the INS can have such deportation permitted as a condition of their supervised release and the district court may order such aliens delivered to INS so that they may be so deported. It does not allow the district court to determine who may be deported.

Further, "[s]tatutory construction 'is a holistic endeavor,' and at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *United States National Bank of Oregon v. Independent Insurance Agents*, 508 U.S. 439, 455 (1993) (citations omitted). Finally, in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), in holding that the Refugee Act of 1980 did not apply to actions taken by the Coast Guard on the High Seas, this Court noted that it would have been "extraordinary for Congress to make such an important change in the law without any mention of that possible effect. Not a scintilla of evidence of such an intent can be found in legislative history." *Id.* at 176. *See also Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129, 137-38 (1991) (finding change in Equal Access to Justice Act was procedural rather than substantive where Congress gave no explanation for change).

The flaw in the Eleventh Circuit's analysis is its mistaken assumption that the word "provide" and the word "order" may be used interchangeably. The Eleventh Circuit, in *United States v. Chukwura*, 5 F.3d 1420 (11th Cir. 1993), *cert. denied*, 105 S.Ct. 102 (1994), held that § 3583 "plainly states that if a defendant is subject to deportation, a court may *order* a defendant deported 'as a condition of supervised release.' " *Id.*, at 1429 (emphasis added). But the court is simply wrong. What the statute says is only that "the court may *provide* . . . that he be deported . . . and may *order* that he be delivered to a duly authorized immigration official for such deportation." 18 U.S.C. § 3583(d) (emphasis added).

The Eleventh Circuit significantly altered Congress' statutory scheme when it substituted the word "order" for the word "provide". There is simply no reason to assume that Congress meant for these words used in the same provision to carry the same meaning. Instead, because Congress used both the words "provide" and "order" in § 3583, both must be read as having specific and distinct meaning. *See United States National Bank of Oregon, supra.*

The structure of § 3583 also supports Petitioner's interpretation of the district court's limited authority. Section 3583(d) empowers the court to impose three types of supervised release conditions: (1) mandatory; (2) discretionary; and (3) provisional. Specifically, the sentencing court is directed to "order" the defendant to follow three explicit mandatory conditions of supervised release. The court is further authorized to "order" appropriate discretionary conditions. Whereas § 3583(d) allows that a sentencing court "may order," all other discretionary conditions, the court's authority for deportation stands alone in a separate sentence as the only condition for which the court's authority is merely to "**provide**".

If Congress had chosen the word "order," it would have constituted a grant of authority to "command [or] authoritatively direct" deportations. 10 Oxford English Dictionary 907 (2d ed. 1989). By contrast, Congress chose the word "provide", which constitutes a direction to the court to "exercise foresight in taking due measure in view of a possible event." 12 Oxford English Dictionary 713 (2d ed. 1989). Thus, the statute allows only that in the event an alien is subject to deportation by the INS, then a court may make that deportation a condition of the alien's supervised release and order the alien delivered to the INS. The statute does not divest the Executive Branch of nearly two centuries of plenary authority to decide what to do with a particular alien.

Furthermore, the statute's requirement that an alien be "subject to deportation" limits the sentencing court's authority and only allows it to make deportation a condition of supervised release when the INS has deemed an alien deportable. The meaning of "subject to deportation" is not intrinsically apparent but rather requires reference to 8 U.S.C. § 1251 and § 1252(b), which define "deportable aliens" and the "proceedings to determine deportability". These statutes make it clear that it is the Attorney General, through INS, who determines eligibility for deportation. Title 8 U.S.C. § 1251 states that "[a]ny alien . . . in the United States shall, upon order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens." 8 U.S.C. § 1251. Similarly, 8 U.S.C. § 1252(b) provides that, aside from § 1252a(d), a deportation hearing *"shall be the sole and exclusive procedure for determining the deportability of an*

alien under this section." 8 U.S.C. § 1252(b) (emphasis added).

In contrast to the extensive procedural direction Congress gave the INS, no part of § 3583, or any statute, gives a district court the authority to determine which aliens are subject to deportation or what procedures the district court should follow in making such a determination. It would be extraordinary for Congress to give district courts, that are not even given jurisdiction to hear appeals from deportation proceedings, authority to conduct their own deportation proceedings without providing any directions, guidelines, or procedures as to how these decisions should be made. Indeed, the Eleventh Circuit's interpretation of § 3583 could result in as many varied approaches to determining who is deportable as there are district courts, as opposed to the uniform and detailed approach contemplated by Congress in 8 U.S.C. §§ 1101-1503 and their corresponding Federal Regulations. *See* 8 C.F.R. § 242.

B. The History Of Congress' Treatment Of Aliens Demonstrates That It Did Not Intend § 3583(d) To Authorize Courts To Exercise Sweeping Power Over The Deportation Of Aliens.

The history of 18 U.S.C. § 3583(d) supports Mr. Ogbomon's interpretation of the statute. "The history of this statute is a powerful argument that Congress never intended to alter this traditional allocation of power between the Article II and Article III branches of government." *United States v. Quaye*, 57 F.3d 447, 450 (5th Cir. 1995).

More than 60 years ago, Congress responded to the practical problem involved in releasing an alien on parole who was subject to deportation. The supervisory nature of parole was considered inconsistent with releasing an alien defendant for the purpose of removing him from the United States and thus, his parole supervision. As a result, a number of aliens were caught in a "catch-22". The alien inmate could not obtain his release on parole because he was subject to deportation and yet he could not obtain a deportation proceeding without being released on parole. In a letter to Congress, Attorney General William D. Mitchell requested that a statutory mechanism to resolve the problem be adopted:

> At the present time there are several hundred inmates serving sentences in Federal prisons who should be deported. Under the present state of the law it has been deemed inconsistent to grant a parole and then immediately take the prisoner into custody under deportation proceedings. Specific authority to parole prisoners who are aliens and subject to deportation seems necessary.

S. Rep. No. 1733, 71st Cong., 3d Sess. 2 (1931). Subsequently, Congress amended 18 U.S.C. § 716 to provide:

> where a federal prisoner is an alien and subject to deportation the board of parole may authorize the release of such prisoner after he shall have become eligible for parole on condition that he be deported and remain outside of the United States and all places subject to its jurisdiction, and upon such parole becoming effective said prisoner shall be delivered to the duly authorized immigration official for deportation.

Act of March 2, 1931, ch. 371, 46 Stat. 1469.

The Committee Reports on the 1931 Act further demonstrate that the purpose of the law was to provide a method for the surrender of an alien prisoner so that deportation proceedings could be conducted; it was not to grant the parole commission the authority to actually order the alien deported. S. Rep. No. 1733, 71st Cong., 3d Sess. 1 (1931); H.R. Rep. No. 1035, 71st Cong., 2d Sess. 1 (1930). *See also Secchi v. United States Bureau of Immigration*, 58 F. Supp. 569 (M.D. Pa. 1945) (holding that the parole commission lacked the power to compel the immigration authorities to deport an alien prisoner).

Since *Secchi*, the courts of appeal have been required to determine whether the district court could make such a directive part of the sentence, or a condition of a special parole term, or a condition of probation. In each instance, the courts of appeal have reached the same conclusion: district courts lack the jurisdiction to order the deportation of aliens. *United States v. Olvera*, 954 F.2d 788 (2nd Cir. 1992), *cert. denied*, 505 U.S. 1211 (1992), (holding that a sentencing court cannot order deportation as a part of the sentence); *United States v. Guevara-Martinez*, 597 F.2d 954 (5th Cir. 1979) (holding that the judiciary lacks authority to order deportation); *United States v. Castillo-Burgos*, 501 F.2d 217 (9th Cir. 1974) (holding that a sentence of deportation was illegal); *United States v. Montoya*, 891 F.2d 1273, 1293, n.24 (7th Cir. 1989) (finding *in dictum* that the Attorney General has exclusive authority to initiate deportation proceedings); *United States v. Hernandez*, 588 F.2d 346 (2d Cir. 1978) (holding that a special parole term's condition of deportation was illegal); and *United States v. Jalilian*, 896 F.2d 447 (10th Cir. 1990) (holding that

a probationary condition of deportation pursuant to 18 U.S.C. § 3563 was illegal).[6]

The 1931 Act is "the initial predecessor of the current § 3583(d)", *Oboh II*, 92 F.3d at 1090 (Barkett, J., dissenting), and was recodified at 18 U.S.C. § 4204 (1952), *see* Act of June 25, 1948, ch. 645, § 4204, 62 Stat. 854, and again at 18 U.S.C. § 4212 (1976), *see* Parole Commission and Reorganization Act, Pub.L. No. 94-233, § 4212, 90 Stat. 227 (Mar. 15, 1976). The language of § 4212 is almost identical to the 1931 Act and bears a striking resemblance to § 3583(d) with one minor difference. Section 4212 was designed for the parole commission, which would directly "authorize the release of such prisoner." In the context of a parole term, the alien is only permitted to be released on the condition that he be deported. Unlike parole, supervised release is an independent term from the custodial sentence. The district court, which would not be responsible for the alien's actual release, is only authorized by Congress to "provide" for the alien's deportation at the conclusion of his custodial sentence by

[6] The majority of circuits which have visited the issue have similarly held that a district court has no authority to order an alien deported as a condition of supervised release under 18 U.S.C. § 3583(d). *United States v. Sanchez*, 923 F.2d 236 (1st Cir. 1991) (per curiam); *United States v. Ramirez*, 948 F.2d 66 (1st Cir. 1991) (Breyer J.); *United States v. Kassar*, 47 F.3d 562 (2d Cir. 1995); *United States v. Xiang*, 77 F.3d 771 (4th Cir. 1996); *United States v. Quaye*, 57 F.3d 447 (5th Cir. 1995); and *United States v. Phommachanh*, 91 F.3d 1383 (10th Cir. 1996).

"order[ing]" his surrender to immigration officials upon the completion of his custodial sentence. *See Oboh II*, 92 F.3d at 1090; *Quaye*, 57 F.3d at 450.

The Eleventh Circuit concedes the similarity in language between § 3583(d) and its statutory antecedents. *Oboh II*, 92 F.3d at 1085. Despite this concession, the court of appeals fails to cite any substantive change in the language used in § 3583(d) which would support a finding that Congress intended to grant the district courts more authority to deport than in the predecessor statute, 18 U.S.C. § 4212.

The Sentencing Reform Act which was enacted in 1984 and became effective on November 1, 1987, abolished parole and instituted a new form of supervision for defendants who complete custodial sentences – supervised release. *See* Pub. L. No. 98-473, Tit. II, ch.2, §§ 218(a)(5), 235, 98 Stat. 2027, 2031. The nearly identical language contained in § 4212 and § 3583(d) compels the conclusion that Congress was merely empowering the district courts to "provide" for the alien's surrender at the completion of his custodial sentence just as the Parole Commission had previously been empowered to "authorize" the release of an alien to the INS when he became eligible for parole.

Moreover, contrary to the Eleventh Circuit's reasoning, the repeal of § 4212 and the enactment of § 3583(d) are related in a way that supports Petitioner's argument.

> [I]t is obvious that the sentence [in § 3583(d)] was patterned after the former § 4212 (footnote omitted). This background suggests that § 3583(d), like its predecessor governing parole, does not authorize a judicial order of deportation, but instead preserves the established procedures under the authority of the INS for effecting the deportation of an alien.

Oboh II, 92 F.3d at 1091 (Barkett, J., dissenting).

C. Section 3583(d) Should Be Read *In Pari Materia* With 8 U.S.C. § 1251 To Preserve The INS' Exclusive Authority Over Deportation Matters.

Under the doctrine of *in pari materia* where " 'there are two acts upon the same subject, the rule is to give effect to both if possible.' " *United States v. Zacks*, 375 U.S. 59, 67-68 (1963) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)). Furthermore, Congress is presumed to enact new legislation with full knowledge of the existing law in that area. *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972). Because Congress did not express a contrary intent, 18 U.S.C. § 3583(d) must be read *in pari materia* with the INA. *United States v. Sanchez*, 923 F.2d 236, 237 (1st Cir. 1991); *see also* 2A Sutherland Statutory Construction §§ 51.02, 51.05 (Sands 4th ed. 1984).

Under the court of appeals' interpretation of § 3583(d), significant portions of 8 U.S.C. §§ 1103(a), 1251, and 1252 are rendered meaningless. This discord is not inherent in § 3583(d). A better way to read the statute is that

> § 3583(d) simply permits the sentencing court to order, as a condition of supervised release, that 'an alien defendant [who] is subject to deportation' be surrendered to immigration officials for deportation proceedings under the Immigration and Naturalization Act. In other words, following appellant's surrender to Immigration authorities, he is entitled to whatever process and procedures are prescribed by and under the Immigration and Naturalization Act for one in appellant's circumstances, for the purpose of determining whether he is 'an alien defendant . . . subject to deportation.'

Sanchez, 923 F.2d at 237. *Accord, United States v. Quaye*, 57 F.3d 447, 449 (5th Cir. 1995). This analysis allows the defendant his procedural protections and retains the INS' traditional authority to determine the issue of deportability.

The interpretation of the court below invokes an impossible situation because the central requirement that the alien must be "subject to deportation" involves a determination that the district court lacks jurisdiction to resolve. Title 8 U.S.C. § 1252 governs the procedure for determining which aliens are "subject to deportation" and the authority to decide that issue resides with the INS. *United States v. Phommachanh*, 91 F.3d 1383, 1386 (10th Cir. 1996). Only by reading the statute as the First Circuit did in *Sanchez* can this anomaly be avoided.

D. Subsequent Legislation Shows That Congress Knows How To Provide For Judicial Orders Of Deportation And That It Does So Without Eliminating INS' Traditional Prerogatives.

Title 18 U.S.C. § 3563, which governs the probationary conditions available, was amended to reflect that the sentencing court possesses the parallel authority to order the surrender of aliens on probation subject to deportation to the INS authorities. Notably, no additional language, which would support the Eleventh Circuit's interpretation that Congress meant for the sentencing courts to have the authority to deport aliens, was added to the language of that statute.

The INA was also amended in April, 1996, and more recently in September, 1996, to provide authority to the sentencing court to order the deportation of individuals previously specified by the Attorney General. The amendments create two new methods of deportation – a judicial deportation, pursuant to 8 U.S.C. § 1252a(d), and a stipulated deportation, pursuant to 8 U.S.C. § 1326. Prior to the amendment, deportations were governed by §§ 1251 and 1252. While the sentencing court now will be able to order deportation, it can do so only after receiving the prior approval of the United States Attorney and the INS. Thus, the court, under these amendments cannot initiate the deportation process *sua sponte*. These amendments cannot logically be squared with the judicial deportation adopted by the court below. It would be anomalous for Congress to subject some aliens to summary deportation and to leave that law in place, while then adopting another law giving those same aliens full procedural protections.

E. The Eleventh Circuit's Interpretation of § 3583(d) Raises Significant Constitutional Concerns

Congress is directed by the Constitution to create a "uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl.4. The very nature of this grant of authority demonstrates the critical importance, whenever possible, of construing statutes which affect aliens to promote uniformity. In essence, the Eleventh Circuit has created an independent means of summarily deporting an alien without the prior approval or review of the INS. The Eleventh Circuit's assumption of plenary authority to deport aliens threatens the uniformity of the process. The threat to the uniformity in deportation proceedings was anticipated by the dissenting opinion in *Oboh II*:

> [T]o read a general power of judicial deportation into § 3583(d), in light of this intervening amendment to § 1252a, would permit district courts to deport some aliens convicted of relatively less serious crimes without affording them any procedural safeguards, with the inapposite result that aliens convicted of particularly heinous crimes would receive the more expansive procedural checks available within the auspices of the Attorney General and INS.

Oboh II, 92 F.3d at 1091 (footnote omitted) (Barkett, J., dissenting) (citations omitted).

In this regard, the Eleventh Circuit's interpretation is inconsistent with the principles of Equal Protection and Due Process. "In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them

into harmony with the Constitution." *The Japanese Case*, 189 U.S. 86, 101 (1903). It is wholly arbitrary to create this class of aliens who are deprived of the protections of the immigration laws which protect aliens. Such a classification cannot survive a heightened scrutiny analysis which is mandated since aliens are a suspect class which is entitled to heightened scrutiny. *Nyquist v. Mauclet*, 432 U.S. 1, 8 (1977); *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

Title 8 U.S.C. § 1252b as well as its predecessor, which was in effect when Mr. Ogbomon was sentenced, guarantees aliens due process during their deportation proceedings by requiring INS to issue an order to show cause, notice, a hearing, an opportunity to seek relief from deportation, the right to secure and proceed with counsel, and a review of the findings. 8 U.S.C. §§ 1252(b) and 1252b. The Eleventh Circuit's summary deportation does not provide such protections and indeed, the court conceded that "we do not contend that these safeguards [those provided to aliens at the sentencing hearing where the defendant is deported] afford defendants recourse from deportation equal to that available under the Immigration and Nationality Act." *Oboh II*, 92 F.3d at 1087.

The Eleventh Circuit has created an arbitrary distinction amongst aliens whereby aliens who have been convicted of an aggravated felony receive more procedural protection than those aliens who have illegally entered such as Mr. Ogbomon. *United States v. Quaye*, 57 F.3d 447, 450 (5th Cir. 1995) (noting that § 1252a(d) would provide procedural safeguards to those convicted of heinous crimes while other aliens would receive none under § 3583). Such a distinction cannot survive a basic rule of

statutory construction: "nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion." *In re Chapman*, 166 U.S. 661, 667 (1897). The interpretation favored by the majority of circuits would not create these constitutional concerns. The Eleventh Circuit's decision would permit the district court to enter a binding final order of deportation against permanent resident aliens and individuals who are otherwise entitled to relief from deportation. This final order of deportation can be entered against the alien arbitrarily and without the procedural protections contained in 8 U.S.C. § 1252(b).[7] Indeed, the Eleventh Circuit concluded in *Oboh II*, that the failure to notify an alien that he is facing deportation at his sentencing hearing did not deny him due process. *Oboh II*, 92 F.3d at 1088.[8] Such an "absurd result" could easily follow if the Eleventh Circuit's decision in *Ogbomon* is upheld.

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[7] Petitioner was not provided with notice of the grounds for deportation, or allowed an opportunity to obtain immigration counsel, or permitted to review the evidence against him and rebut the same or seek any discretionary relief from deportation or make an asylum claim.

[8] The Eleventh Circuit has given "notice" a new definition. Rather than acknowledging that a defendant is entitled to be notified by the United States Attorney or the INS that there will be a deportation proceeding initiated against him at the sentencing, as is required by 8 U.S.C. § 1252, the court found that the mere existence of the statute, § 3583(d) was sufficient notice. *Oboh II*, 92 F.3d at 1088.

F. The Eleventh Circuit's Interpretation Of § 3583(d) Is At Odds With The Traditional Allocation Of Authority Between The Executive And Judicial Branches Of Government In The Deportation Scheme.

The Constitution provides that: "The Congress shall have Power To establish an uniform Rule of Naturalization, . . . " U.S. Const. art. I, § 8, cl.4. Congress, pursuant to its power to govern immigration law, passed the Alien Act of June 25, 1798, which provided the Executive Branch with the authority to act in immigration matters. Frank L. Auerbach, Immigration Laws of the United States 1 (1955).

This Court has repeatedly recognized the power of Congress to govern the admission and deportation of aliens and to delegate this authority to the Executive Branch. *The Chinese Exclusion Case*, 130 U.S. 581 (1889). *See also United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904); *Oceanic Steam Navigation Company v. Nevada N. Stranahan*, 214 U.S. 320, 339-40 (1908) ("the authority of Congress over the right to bring aliens into the United States embraces every conceivable aspect of that subject. . . . "); *Shaughnessy v. United States*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments **largely immune from judicial control**") (emphasis added); *Fang Ye Tang v. United States*, 149 U.S. 698 (1893); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

Despite the clear delegation of authority to the Attorney General, the Eleventh Circuit concluded that Congress *sub silentio* granted the Judicial Branch, for the first time, the authority to deport aliens, a power possessed by the Executive Branch for virtually two hundred years. In essence, the Eleventh Circuit has found that in 1987, Congress radically changed the balance of power by delegating the authority to deport to the judiciary. "From 1798 to the enactment of § 3583(d) in 1987, the Executive Branch retained exclusive authority to order the deportation of aliens." *Oboh II*, 92 F.3d at 1086, n. 4.

To support this extraordinary shift in authority, the court of appeals relies upon the history of federal judicial authority to issue a judicial recommendation against deportation ("JRAD"). 8 U.S.C. § 1251(b) (repealed 1990). Under § 1251(b), the district court could recommend whether the offense for which the defendant was being sentenced should be characterized as a crime of moral turpitude. If the court found that an offense did not involve moral turpitude, the INS was prohibited from deporting the alien based on that conviction alone. According to the Eleventh Circuit, this history demonstrates a congressional willingness to allow the judiciary an opportunity to participate substantially in the deportation process.

Despite the limited nature of the district court's authority to affect the deportation process by granting a JRAD, the Eleventh Circuit relies upon this history in concluding that Congress has broken with the past by giving the judiciary the ability "to thwart INS's ability to deport" through the JRAD. *Oboh II*, 92 F.3d at 1086. The fact that § 3583(d) was enacted in 1987, three years before

the JRAD was abolished in 1990, plays a significant role in the Eleventh Circuit's analysis:

> The plain meaning of § 3583(d) taken together with abolishment of JRADs, a longstanding mainstay in the criminal process, not only persuades us that Congress intended to enable district courts to order the deportation of defendants 'subject to deportation,' but in fact favors such deportation when either the Executive or Judicial Branch deems it appropriate.

Oboh II, 92 F.3d at 1087. But, the abolition of the JRAD cannot bear the weight the court of appeals assigns to it in interpreting § 3583(d). The JRAD was a modest incursion into the deportation process. The INS still possessed the authority to deport an alien on any other cognizable ground, so that the district court's finding did not protect the alien from deportation. Further, the district court's authority to make such recommendations was abolished in 1990. Immigration Act of 1990, Pub. L. No. 101-649, section 505(a). Contrary to the Eleventh Circuit's interpretation of the history of the JRAD, the loss of the district court's authority to issue a JRAD suggests a movement away from providing judicial control which binds the INS.

It is inconceivable that Congress would alter the scheme *sub silentio*, so as to allow the judiciary to summarily deport aliens without affording aliens any of the "elaborately detailed procedures" of the INS. *Oboh II*, 92 F.3d at 1090 (Barkett, J., dissenting); *United States v. Sanchez*, 923 F.2d 236 (1st Cir. 1991). Specifically, aliens deported under § 3583(d) would be deprived of not only a deportation proceeding with its attached protections of

notice and an opportunity to be heard, but more importantly the opportunity to obtain asylum or other discretionary relief available in INS proceedings. Only by narrowly construing the statute is it possible to engage in "no derogation of appellant's procedural rights, nor does it arrogate any executive power vested in the Attorney General to determine appellant's deportability." *Sanchez*, 923 F.2d at 237-8.

The Fifth Circuit was similarly impressed by tradition in refusing to find that

> Congress intended to undermine that executive prerogative *sub silentio* in section 3583(d), or that Congress intended by its silence to deprive aliens deported at sentencing of such relief as alien asylum, which the Attorney General may grant. We insist on greater clarity of purpose when a statute would be read to upset a status quo long in place.

Quaye, 57 F.3d at 450. In the absence of such clarity, § 3583(d) must be interpreted as a mere recodification of § 4212.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

STATUTE INVOLVED

18 U.S.C. § 3583(d) Conditions of Supervised Release:

* * *

> If an alien defendant is subject to deportation the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

Supreme Court, U.S.
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No. 95-8736

In the Supreme Court of the United States

OCTOBER TERM, 1996

LARRY OSA OGBOMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 18 U.S.C. 3583(d) authorizes a district court to order a criminal defendant deported, as a condition of supervised release, without recourse to the standards and procedures for determining deportability and relief from deportation under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, and implementing regulations.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-8736

LARRY OSA OGBOMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 15-16) is unpublished, but the judgment is noted at 55 F.3d 638 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1995. A petition for rehearing was denied on January 22, 1996. J.A. 17-18. The petition for a writ of certiorari was filed on April 19, 1996. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of Section 3583 of Title 18 are reprinted at App., *infra*, 1a-2a.

STATEMENT

Following a plea of guilty in the United States District Court for the Northern District of Georgia, petitioner was convicted of unlawfully entering the United States, in violation of 8 U.S.C. 1326. The district court sentenced petitioner to 16 months' imprisonment, to be followed by a three-year term of supervised release which included, as a special condition, that petitioner be deported. J.A. 10-14. The court of appeals affirmed, finding the condition authorized under 18 U.S.C. 3583(d). J.A. 15-16.[1]

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[1] This case involves the interaction of Section 3583(d) and the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Congress has amended the INA in significant respects since the district court entered judgment in this case on April 28, 1994. On September 13, 1994, Congress enacted the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 130001-130010, 108 Stat. 2023-2031, which included, *inter alia*, a provision for the expeditious deportation of certain criminal aliens. On October 24, 1994, Congress enacted the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 224(a), 108 Stat. 4322-4324, which added, *inter alia*, a provision for judicial deportation in certain cases, upon the request of the United States Attorney and the concurrence of the Commissioner of the INS, as discussed at pp. 33-37, *infra*. On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, §§ 431-443, 110 Stat. 1273-1281, which amended, *inter alia*, provisions of the INA to limit judicial review of final administrative orders of deportation in cases involving aliens convicted of certain offenses. Most recently, on September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, Div. C, 110 Stat. ___ (*reproduced at* 138 Cong. Rec. H11,787-H11,833 (daily ed. Sept. 28, 1996)), which provides, *inter alia*, for elimination of judicial review of many of the determinations made by the Attorney General during

1. Petitioner, a Nigerian citizen, previously had been convicted of bank fraud, forgery, theft by taking, and bad check offenses, and had been deported to Nigeria on November 20, 1991. See Oct. 19, 1993, Crim. Complaint; Gov't C.A. Br. 2, 8. On October 12, 1993, petitioner was found in the United States and, on November 16, 1993, was indicted on one count of having entered the United States, without consent of the Attorney General, after having been previously deported, in violation of 8 U.S.C. 1326. See Oct. 19, 1993, Crim. Complaint; J.A. 2. On January 18, 1994, he entered a plea of guilty. J.A. 15; Gov't C.A. Br. 2. In the presentence report (PSR), the probation officer included the following condition of supervised release:

> Upon completion of the imprisonment portion of the sentence, the defendant shall be deported from the United States pursuant to 18 usc 3583(d). He/she shall be delivered to a duly-authorized Immigration official for such deportation and shall be detained in the custody of the Immigration and

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deportation proceedings and, as discussed at pp. 37-38, *infra*, for judicial deportation orders based on stipulations and as a condition of probation, upon concurrence of the Attorney General or her delegates. Most of the relevant portions of the IIRAIRA do not become effective until April 1, 1997, see IIRAIRA § 309 (*reproduced at* 138 Cong. Rec. H11,808 (daily ed. Sept. 28, 1996)). Unless otherwise indicated, all references to the INA are to the version in effect at the time of petitioner's sentencing. For purposes of this brief, we use the pre-IIRAIRA terminology that governed the proceedings below, and our references to administrative proceedings and judicial review are to the pre-IIRAIRA procedures unless otherwise indicated.

Naturalization Service until deported from the United States.

Gov't C.A. Br. 3; PSR 10 (Worksheet D). Petitioner did not object to that portion of the PSR. PSR 12.

The district court sentenced petitioner to 16 months' imprisonment, to be followed by three years' supervised release. J.A. 11-12. In accordance with the probation officer's recommendation, the court directed, as a condition of supervised release, that petitioner "be deported from the United States pursuant to 18 United States Code, Section 3583(d)." J.A. 9. The court ordered that petitioner "shall depart the United States when ordered to do so by the Immigration and Naturalization Service * * * [and] shall take no action to appeal or resist any order of deportation by the Immigration and Naturalization Service and if deported, shall not reenter the United States during the term of supervised release." J.A. 12.

2. Petitioner appealed, contending, *inter alia*, that the district court's order of deportation, as a condition of supervised release under 18 U.S.C. 3583(d), exceeded the court's authority. Pet. C.A. Br. 2, 7-15. The United States and the court of appeals similarly interpreted the order as an order of judicial deportation under Section 3583(d). See Gov't C.A. Br. 2; J.A. 15-16.

The court of appeals affirmed, based on its earlier ruling in *United States* v. *Chukwura*, 5 F.3d 1420 (11th Cir. 1993), cert. denied, 115 U.S. 102 (1994), that a district court is authorized by Section 3583(d) to order deportation as a condition of supervised release. J.A. 15-16. In its brief on appeal, the government informed the court that it had reconsidered its interpretation of Section 3583(d) and had concluded that Section 3583(d) does not authorize a sentencing court to order an alien defendant deported without affording him an opportunity to invoke the standards and procedures of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* See Gov't C.A. Br. 5-7.[2] The court of appeals acknowledged the change in the government's position, but concluded that it was not free to overrule *Chukwura* and affirmed petitioner's sentence. J.A. 16.[3]

[2] Initially, in the *Chukwura* case in the court of appeals, the United States had taken the position that Section 3583(d) authorizes a district court to order an alien defendant deported without resort to the standards and procedures of the INA. The United States had taken the contrary position, however, in the First Circuit in *United States* v. *Sanchez*, 923 F.2d 236 (1991), and had argued that Section 3583(d) does *not* authorize a district court to order the deportation of an alien defendant. The courts of appeals in each instance agreed with the view advocated by the United States. In light of the inconsistent positions taken by the United States in the two circuits, the conflicting circuit rulings that resulted, and the responsibilities of the Attorney General and the Immigration and Naturalization Service in administering the INA, the United States reexamined its views in responding to the petition for a writ of certiorari in *Chukwura*. We concluded that, contrary to the position adopted by the Eleventh Circuit, Section 3583(d) does not authorize a district court to order the actual deportation of an alien in a manner that bypasses the deportation proceedings established by the INA. This Court ultimately denied review in *Chukwura* and in another case from the Eleventh Circuit in which the petitioner had raised the same issue in a petition for a writ of certiorari before judgment, *Chatima* v. *United States*, cert. denied, 115 S. Ct. 352 (1994) (No. 94-5633).

[3] Petitioner had also contended that the district court had erred in failing to make findings of fact as to his deportability and in failing to consider the possibility of suspension of deportation. The court of appeals declined to address those issues

3. The court of appeals denied petitioner's petition for rehearing and suggestion for rehearing en banc on January 22, 1996. J.A. 17-18.

Petitioner had completed service of his term of imprisonment for his 1994 conviction under Section 1326 in December 1994. At that point, INS conducted proceedings concerning his deportation.[4] On April 10, 1996, however, after he was arrested on criminal charges in another district (see note 5, *infra*), the district court in the instant case entered an order revoking petitioner's supervised release. The order does not recite the grounds for revocation. The probation officer's petition for revocation cited four grounds, none of which was the fact that petitioner had not been deported. The court imposed a sentence of 12 months' imprisonment upon revocation, but it did not impose a new term of supervised release.

The order of the district court revoking petitioner's supervised release and ordering his imprisonment raises a question of mootness. It is unclear whether the district court contemplated that petitioner would be deported under the original sentence imposing deportation as a condition of supervised release, now that petitioner's supervised release has been revoked. Accordingly, it is not clear whether

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because petitioner had not raised them in the district court. See J.A. 16 n.1.

[4] Upon completion of his term of imprisonment, petitioner was surrendered to the INS pursuant to an INS detainer and released on bond. On June 5, 1995, an immigration judge entered a warrant of deportation ordering the INS to arrest and deport petitioner. On February 1, 1996, an immigration judge denied petitioner's motion to reopen his deportation proceedings. On March 6, 1996, petitioner was arrested pursuant to the warrant of deportation.

a successful challenge to the deportation condition would have any effect on petitioner's sentence. Moreover, the Eleventh Circuit does not appear to have addressed the issue of whether an order of judicial deportation under its interpretation of Section 3583(d) may be carried out following the revocation of a defendant's supervised release and the completion of the term of his imprisonment imposed upon revocation, where, as here, there is no new term of supervised release.[5]

4. a. Meanwhile, on November 13, 1995, the court of appeals granted rehearing en banc in consolidated appeals in which two alien defendants had raised the same challenge to the authority of a district court to enter a judicial deportation order as a condition of supervised release under Section 3583(d), and had urged the court of appeals to overrule *Chukwura*.

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[5] Further, on March 18, 1996, a criminal complaint was filed in the United States District Court for the Northern District of Alabama, charging petitioner with having committed bank fraud, in violation of 18 U.S.C. 1344. A magistrate judge of that court issued a warrant for petitioner's arrest which was executed on March 21, 1996. After his indictment on a variety of federal charges, petitioner pleaded guilty to all counts and was sentenced to 24 months' imprisonment, to be followed by five years' supervised release. One of the conditions of his supervised release is that petitioner "shall be deported immediately upon completion of the term of imprisonment and shall remain outside the United States during the period of supervised release, in accordance with 18 USC 3583(d) and with *U.S. v. Chukwura*, 5 F.3d 1420 (11th Cir. 1993). To that end, [petitioner] shall be remanded to the custody of the U.S. Marshal Service for delivery to an authorized Immigration and Naturalization Service official for execution of the deportation order." *United States* v. *Ogbomon*, No. CR 96-PT-124-NE (N.D. Ala. Aug. 29, 1996), at 3. That order is not before this Court.

See *United States* v. *Oboh*, 70 F.3d 87 (11th Cir. 1995) (vacating the panel opinion in *United States* v. *Oboh*, 65 F.3d 900 (11th Cir. 1995), and ordering that the case be reheard by the court en banc).

On rehearing en banc in *Oboh*, the court of appeals, by a 7-5 vote, reaffirmed *Chukwura*, despite contrary rulings by three other courts of appeals. *United States* v. *Oboh*, 92 F.3d 1082, 1083 (11th Cir. 1996) (acknowledging conflicting rulings in *United States* v. *Sanchez*, 923 F.2d 236 (1st Cir. 1991); *United States* v. *Xiang*, 77 F.3d 771 (4th Cir. 1996); and *United States* v. *Quaye*, 57 F.3d 447 (5th Cir. 1995)), petitions for cert. pending, Nos. 96-6653 & 96-6658 (filed Nov. 6, 1996). The *Oboh* majority found that the language of Section 3583(d) supported its conclusion that a district court is authorized to order an alien's deportation as a condition of supervised release. 92 F.3d at 1084. It noted that other circuits had rejected that conclusion after interpreting Section 3583(d) in light of the traditional allocation of power between the Executive and Judicial Branches, which grants the Executive sole authority to make deportation decisions. The *Oboh* majority viewed that allocation of power differently, however, relying on an earlier provision of the INA (former 8 U.S.C. 155 (1940); 8 U.S.C. 1251(b)(2) (1988)) that authorized a sentencing court to issue a judicial recommendation against deportation to bar the INS from using the conviction underlying that particular criminal sentence as a basis for deportation. 92 F.3d at 1086. The court viewed Congress's abolition of the courts' recommendation authority in 1990 and its enactment of Section 3583(d) a few years earlier to indicate not only that "Congress intended to enable district courts to order the deportation of defendants 'subject to deportation,' but

[that Congress] in fact favors such deportation when either the Executive or Judicial Branch deems it appropriate." *Id.* at 1087.

The *Oboh* majority found further support in Congress's subsequent enactment of Section 242A(d) of the INA, 8 U.S.C. 1252a(d), which authorizes district courts to order the deportation of alien defendants upon the request of the United States Attorney and the concurrence of the Commissioner of the INS. 92 F.3d at 1087. The court rejected the defendants' arguments that judicial deportation under Section 3583(d) did not afford them the procedural safeguards established in the INA. The court noted that procedural safeguards exist in the sentencing process through appellate review and that, although greater procedural safeguards are available under the INA, that was a matter for Congress, not the court, to decide. *Ibid.*

The court of appeals rejected appellant Oboh's argument that the district court's deportation order had denied him due process because he had not been given adequate notice of the deportation determination and had not been afforded an opportunity to present evidence or to argue that he is not subject to deportation. 92 F.3d at 1087-1088. The court found that the language of Section 3583(d) gave Oboh sufficient notice that the district court could deport him as a condition of supervised release. *Id.* at 1088. The court also found the evidence sufficient to establish that Oboh was subject to deportation, in that the United States had introduced at the sentencing hearing an INS document that revealed that Oboh had entered the United States unlawfully. *Id.* at 1087-1088 The court noted that the appellant in the other

case, which had been consolidated for purposes of rehearing en banc, did not challenge the fact that he was subject to deportation or the notice and opportunity provided him regarding relief from deportation under the INA. *Id.* at 1087 n.8.

b. Five members of the court of appeals dissented, agreeing with the First, Fourth, and Fifth Circuits that Section 3583(d) "provides only that a defendant who is subject to deportation may be surrendered to the INS for deportation proceedings in accordance with" the INA. 92 F.3d at 1088 (Barkett, J., dissenting, joined by Kravitch, Anderson, Birch, and Carnes, JJ.). The dissent emphasized that Section 3583(d) authorizes district courts to "provide" that alien defendants be deported as a condition of supervised release, but does not authorize district courts to "order" deportation. *Ibid.* Construing that language to permit, but not to order, deportation accords with the overall purpose of Section 3583(d), because it clarifies that a court may allow the INS to deport an alien notwithstanding the fact that he is serving a term of supervised release. *Id.* at 1089. The dissent also explained that its interpretation "conforms with the uniform historical practice of Congress conferring on Executive Branch officials the authority to institute deportation proceedings against an alien." *Ibid.* Noting that Congress has vested immigration authority in the Attorney General and has established the administrative procedures that govern her deportation determinations, the court concluded that the single sentence in Section 3583(d) referring to deportation did not "carve out an exception to the Attorney General's authority over immigration matters." *Ibid.*

The dissent viewed its interpretation to be consistent with the background of Section 3583(d) and its predecessor statutes which did not authorize judicial orders of deportation. It also noted that courts had in many contexts held that district courts historically have lacked the authority to order the deportation of a criminal defendant, and it found its reading of Section 3583(d) to be consistent with that body of authority. 92 F.3d at 1090-1091. Finally, the dissent relied on Congress's subsequent enactment of Section 1252a(d), which authorizes judicial deportation of aliens in cases involving certain serious offenses, but only upon the request of the United States Attorney and with the concurrence of the INS. The dissent concluded that, in light of that amendment, to read a general power of judicial deportation into Section 3583(d) would produce an absurd result: aliens convicted of less serious crimes could be deported by judicial order without the procedural safeguards afforded by Section 1252a(d) to aliens convicted of more serious crimes. *Id.* at 1091-1092 (citing, *inter alia*, *United States* v. *Quaye*, 57 F.3d at 450; *United States* v. *Xiang*, 77 F.3d at 773).

SUMMARY OF ARGUMENT

Section 3583(d) of Title 18 does not authorize a district court to order an alien defendant deported as a condition of supervised release without recourse to the standards and procedures for deportation determinations established by the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and its implementing regulations. Rather, Section 3583(d) authorizes a sentencing court to "provide" for deportation, if the alien is subject to it, *i.e.*, to permit a

determination by the Attorney General whether an alien defendant is subject to deportation under the INA and to order an alien surrendered to immigration officials for that purpose and for deportation. That interpretation of Section 3583(d), adopted by the other four circuits that have addressed the question, is consistent with the text, purpose, history, and structure of Section 3583(d).

The court of appeals' view that Section 3583(d) authorizes a district court to enter a deportation order as a condition of supervised release runs counter to Congress's long-standing practice of vesting sole authority for immigration matters, including deportation determinations, in the Attorney General and her delegates. It also is inconsistent with the structure of Section 3583(d), which authorizes a district court to take certain actions with regard to deportation only "[i]f an alien defendant is subject to deportation." 18 U.S.C. 3583(d). Whether an alien is subject to deportation can be answered only under the INA, in which Congress has identified what classes of persons are deportable, what circumstances may warrant relief from deportation, and what procedures the Attorney General must follow in making those determinations. Consequently, Section 3583(d) and the INA must be construed together so as to give effect to both. Read against that backdrop, the single sentence in Section 3583(d) concerning aliens subject to deportation does not sanction the entry of judicial deportation orders that bypass the INA proceedings administered by the Attorney General and the statutory standards governing deportability and relief from deportation. Recent statutory enactments regarding judicial deportation orders confirm that,

when Congress intends to grant district courts jurisdiction to enter judicial deportation orders, it does so explicitly and provides for a means by which the approval of the Attorney General, or her delegates, is required to obtain such a deportation order.

ARGUMENT

SECTION 3583(d) OF TITLE 18 DOES NOT AUTHORIZE A DISTRICT COURT TO ORDER THE DEPORTATION OF AN ALIEN DEFENDANT AS A CONDITION OF SUPERVISED RELEASE

The court of appeals interpreted Section 3583(d) to permit a district court to order an alien defendant deported without reliance on the standards and procedures of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* The other four circuits that have considered the question have disagreed with the Eleventh Circuit's interpretation and have held that Section 3583(d) does not give a district court such authority, but does authorize a court "to impose as a condition of supervised release that a defendant be delivered to the INS for deportation proceedings consistent with the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101-1524." *United States* v. *Phommachanh*, 91 F.3d 1383, 1385 (10th Cir. 1996); accord *United States* v. *Xiang*, 77 F.3d 771, 772 (4th Cir. 1996); *United States* v. *Quaye*, 57 F.3d 447, 449-451 (5th Cir. 1995); *United States* v. *Ramirez*, 948 F.2d 66, 68 (1st Cir. 1991); *United States* v. *Sanchez*, 923 F.2d 236, 237 (1st Cir. 1991); see also *United States* v. *Kassar*, 47 F.3d 562, 568 (2d Cir. 1995). Those other circuits are correct.

A. The Text, Purpose, And History Of Section 3583(d) Establish That A District Court May Provide For Deportation Of An Alien Defendant By The Attorney General If The Alien Is Subject To Deportation Under The Immigration And Nationality Act, Notwithstanding Other Terms Of Supervised Release, But The District Court Is Not Authorized To Order The Deportation Of An Alien

1. Section 3583 of Title 18 authorizes, and in some instances mandates, federal district courts to include, as a part of a criminal defendant's sentence to a term of imprisonment, a requirement that the defendant be placed on a term of supervised release after imprisonment. 18 U.S.C. 3583(a). A term of supervised release constitutes a period of time during which a person released from prison is subject to supervision by a probation officer. 18 U.S.C. 3601. The degree of supervision is determined according to the conditions specified by the sentencing court. *Ibid.* Violation of a term of supervised release may result in the modification of the conditions of supervised release or the revocation of supervised release. 18 U.S.C. 3583(e).[6]

[6] If supervised release is revoked, the person is returned to prison to serve all or part of the term of supervised release authorized by statute for the initial offense that resulted in the supervised release, without credit for the time served on release, subject to certain statutory maximum terms. 18 U.S.C. 3583(e)(3). In lieu of revocation, district courts may extend a term of supervised release if less than the maximum authorized term was previously imposed. 18 U.S.C. 3583(e)(2). If the conduct of a person on supervised release merits favorable action, a district court may terminate a term of supervised release early and discharge the person at any time after the expiration of one year of supervised release. 18 U.S.C. 3583(e)(1).

The district court's authority to impose a term of supervised release is limited in numerous respects by Section 3583. For example, Section 3583(b) establishes the maximum length of the term of supervised release that a district court is authorized to impose in different categories of cases. Section 3583(c) mandates that a district court consider a specific list of factors when determining whether to include a term of supervised release, the length of such a term, and the conditions to impose on the term of release in a particular case.

Section 3583(d) addresses the various conditions that a district court may, and in some instances must, impose on the term of supervised release. It authorizes district courts to impose three types of conditions on supervised release. First, it requires that certain mandatory conditions be imposed in all cases. It states that the district court "shall order, as an explicit condition of supervised release," that the defendant not commit another crime, that he or she not unlawfully use or possess a controlled substance, and that he or she submit to periodic drug testing.[7] Second, Section 3583(d) grants district courts discretion to impose additional conditions. It states that a district court "may order, as a further condition of supervised release," certain conditions that are set forth as discretionary conditions for probation and "any other condition it considers to be appropriate," to the extent such condition is reasonably related to particular sentencing factors, involves

[7] Section 3583(d) imposes certain other mandatory conditions in cases involving domestic violence crimes.

no greater deprivation of liberty than necessary, and is consistent with the Sentencing Commission's policy statements. Third, Section 3583(d) states that

> [i]f an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that [the alien] be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

Section 3583(d) does not authorize a district court to *order* an alien defendant deported as a condition of supervised release. Whereas Congress used the verb "order" to describe what a district court is authorized to do in imposing the listed mandatory and discretionary conditions, it did not use that verb to describe what a district court is authorized to do with regard to deportation of an alien. Instead, Congress used the verb "provide." Congress's intent to convey a different meaning by its use of a different verb is apparent from the fact that it also used the verb "order" in that final sentence, but only to authorize the court to order the delivery of a defendant to an immigration official for deportation. The Tenth Circuit succinctly analyzed the terms used in the final sentence of Section 3583(d) as follows:

> By using two different verbs to describe what a district court may do under § 3583(d), Congress presumably intended the verbs to convey their respective meanings. * * * The verb "provide" is defined as "[t]o exercise foresight in taking due measures in view of a possible event;" * * * whereas the verb "order" is defined as "[t]o . . . command [or] authoritatively direct." * * * Had Congress intended that § 3583(d) allow the sentencing court to *order*, or "authoritatively direct," deportation, it could have easily so stated. However, its choice of the verb "provide" connotes a different, presumably intended, meaning; it allows the sentencing court "[t]o exercise foresight . . . in view of a possible event," * * * by directing that in the event that the INS determines that the defendant-alien is "subject to deportation" upon release from prison, *see* 18 U.S.C. § 3583(d), then the defendant-alien is to be deported.

United States v. *Phommachanh*, 91 F.3d at 1385-1386 (quoting 10 *The Oxford English Dictionary* 907 (2d ed. 1989); 12 *id.* at 713); see also *United States* v. *Xiang*, 77 F.3d at 772; *United States* v. *Quaye*, 57 F.3d at 449; *United States* v. *Oboh*, 92 F.3d 1082, 1088 (11th Cir. 1996) (Barkett, J., dissenting, joined by Kravitch, Anderson, Birch, and Carnes, JJ.), petitions for cert. pending, Nos. 96-6653 & 96-6658 (filed Nov. 6, 1996).

2. Examination of the purpose and history of Section 3583(d) demonstrates that Congress did not intend that the final sentence of Section 3583(d) be interpreted beyond its plain meaning to extend to judicial deportation orders. Rather, that provision was intended to harmonize the government interests served by supervised release with those furthered by deportation of criminal aliens.

a. Supervised release is intended to ensure that a person released from prison and placed back into the community is supervised by a probation officer. The duties of a probation officer who is supervising a released person include, for example, keeping informed of the supervisee's conduct, condition, and work and

reporting such information to the sentencing court; assisting the supervisee to improve his conduct and condition; and keeping informed of the supervisee's compliance with the conditions of release, including payment of fines or restitution, and reporting such information to the sentencing court. 18 U.S.C. 3603(2), (3), (5), and (7). In order to facilitate such supervision, the standard conditions of supervised release generally include, *inter alia*: a prohibition against the supervisee leaving the judicial district without permission of the court or the probation officer; a requirement that the supervisee report, in person, to the probation officer on a periodic basis; and a requirement that the supervisee permit a probation officer to visit him at any time at home, or any other place, and permit confiscation of any contraband observed by the officer. See, *e.g.*, J.A. 13-14.

Deportation of a supervisee would be inconsistent with many conditions of supervised release. Deportation would make it impossible for the supervisee to comply with conditions such as reporting, in person, to a probation officer or having a probation officer visit the supervisee's home or workplace. It also would make it impossible for a probation officer to fulfill various statutory duties of supervision, such as assisting the supervisee to improve his condition and conduct and keeping apprised of the supervisee's whereabouts and work habits.

Thus, "[w]ithout a provision such as the last sentence of § 3583(d), 'administrative' deportation by the INS might be regarded as inconsistent with *judicially supervised* release." *United States* v. *Oboh*, 92 F.3d at 1089 (Barkett, J., dissenting, joined by Kravitch, Anderson, Birch, and Carnes, JJ.). Express

congressional authorization for courts to provide for deportation as a condition of supervised release was necessary to ensure that supervised release would not stand as an obstacle to deportation of an alien defendant merely because he had not yet completed his full supervised release term. Thus, the final sentence of Section 3583(d) makes clear that a court can provide for deportation of an alien defendant by the Attorney General if the alien is subject to deportation under the INA, notwithstanding that deportation would make it impossible for certain other conditions of supervised release to be met.

Further support for that interpretation of Section 3583(d) is found in the fact that, at the same time Congress enacted Section 3583(d), it amended Section 242(h) of the INA to specify that supervised release is not "a ground for deferral of deportation." 8 U.S.C. 1252(h). See Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, § 212(a)(2), 98 Stat. 1999 (enacting Section 3583(d) of Title 18); *id.* § 220(b), 98 Stat. 2028 (amending Section 242(h) of the INA). The amendment provided that, unlike a term of imprisonment (which precluded deportation until the full term has been served), the new sanction of supervised release was to be treated like parole and probation, which do not preclude the deportation of an alien. As amended, Section 242(h) provided:

> An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement. Parole, supervised release, probation, or possibility of rearrest or further confinement

> in respect of the same offense shall not be a ground for deferral of deportation.

8 U.S.C. 1252(h).[8] Read in conjunction with that contemporaneously enacted provision, Section 3583(d) is best interpreted as confirmation that deportation of a criminal alien during supervised release could proceed under the INA, notwithstanding that such deportation would be inconsistent with other terms of release.[9]

b. The history of Section 3583(d) and its predecessor statutes indicates that Section 3583(d) was

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[8] The AEDPA subsequently amended Section 242(h) of the INA to permit the deportation of criminal aliens before the completion of a term of imprisonment in certain cases involving nonviolent offenses if it would serve the best interests of the United States. See AEDPA § 438(a), 110 Stat. 1275 (adding subsection (2), 8 U.S.C. 1252(h)(2)). The IIRAIRA rewrote Section 242 of the INA in its entirety. See IIRAIRA § 306 (*reproduced at* 138 Cong. Rec. H11,803-H11,804 (daily ed. Sept. 28, 1996)). Similar substantive provisions are now found in Section 241(a)(4) of the INA, as added by Section 305(a)(3) of the IIRAIRA (*reproduced at* 138 Cong. Rec. H11,801 (daily ed. Sept. 28, 1996)) (to be codified at 8 U.S.C. 1251(a)(4)).

[9] As the dissenters in *Oboh* point out, the fact that Section 3583(d) specifies that a court may provide that an alien defendant be deported "as a condition of supervised release" also weighs against an interpretation of that section to authorize a court to enter a judicial order of deportation. See *United States* v. *Oboh*, 92 F.3d at 1088-1089. By stating that the court may include deportation as a condition of supervised release, it implies that the consequence of a failure to satisfy that condition is that the court may revoke or modify the defendant's supervised release, see 18 U.S.C. 3583(e), not that the court may order the Attorney General to make a determination that deportation is warranted and deport the defendant. 92 F.3d at 1088-1089; cf. *United States* v. *Quaye*, 57 F.3d at 449.

intended to authorize a district court to provide for the Attorney General's deportation determination under the INA, not to authorize the district court to order deportation directly. The initial predecessor of the current Section 3583(d) was enacted in 1931, as an amendment to 18 U.S.C. 716 (1925), which governed the parole of prisoners. The amendment provided that

> where a Federal prisoner is an alien and subject to deportation the board of parole may authorize the release of such prisoner after he shall have become eligible for parole on condition that he be deported and remain outside of the United States and all places subject to its jurisdiction, and upon such parole becoming effective said prisoner shall be delivered to the duly authorized immigration official for deportation.

Act of Mar. 2, 1931, ch. 371, 46 Stat. 1469. The committee reports accompanying that 1931 amendment explained that, because the then-current rules governing parole required that a prisoner remain within the jurisdiction of the court, an alien prisoner, who would be deported if paroled, could not be paroled because it was known that he would not be remaining in the court's jurisdiction. See S. Rep. No. 1733, 71st Cong., 3d Sess. 1 (1931); H.R. Rep. No. 1035, 71st Cong., 2d Sess. 1 (1930). The 1931 amendment established a means by which the parole board could facilitate deportation by immigration officials before completion of the service of the alien's full term of imprisonment. It did not, however, authorize the parole board to order the deportation of an alien and supplant the normal deportation procedures. See *United States* v. *Quaye*, 57 F.3d at 450; *Secchi* v. *U.S.*

Bureau of Immigration, 58 F. Supp. 569 (M.D. Pa. 1945).

The provision was subsequently recodified at 18 U.S.C. 4204 (1952), see Act of June 25, 1948, ch. 645, § 1, 62 Stat. 854, and later at 18 U.S.C. 4212 (1976), see Parole Commission and Reorganization Act, Pub. L. No. 94-233, § 2, 90 Stat. 227 (1976). Section 4212 was repealed by the Sentencing Reform Act of 1984, which replaced the system of indeterminate sentencing and parole with sentencing under the Sentencing Guidelines and created supervised release, including the current Section 3583(d), at issue here. See Pub. L. No. 98-473, Tit. II, Ch. II, §§ 212(a)(2), 218(a)(5), 235, 98 Stat. 1999, 2027, 2031. The committee reports accompanying the Sentencing Reform Act do not specifically discuss the final sentence of Section 3583(d) concerning deportation of aliens, but it is obvious that that sentence was patterned after the former Section 4212.[10] Those origins indicate that Section 3583(d), like its predecessor that governed parole, does not authorize a judicial order of deportation. Instead, it preserves the established authority of the Attorney General to effect the deportation of an alien and provides for carrying out such an order without violating the statutory terms of supervised release. See *United States* v. *Quaye*, 57 F.3d at 450; *United States*

[10] The former 18 U.S.C. 4212 (1976), as in effect when the Sentencing Reform Act was passed, provided:

> When an alien prisoner subject to deportation becomes eligible for parole, the Commission may authorize the release of such prisoner on condition that such person be deported and remain outside the United States.
>
> Such prisoner when his parole becomes effective, shall be delivered to the duly authorized immigration official for deportation.

v. *Oboh*, 92 F.3d at 1090-1091 (dissenting opinion). As the Fifth Circuit describes Section 3583(d), it "paves the way for Executive Branch deportation proceedings; it does not permit courts to order deportation alone." *United States* v. *Quaye*, 57 F.3d at 450 (the history of Section 3583(d) presents "a powerful argument that Congress never intended to alter th[e] traditional allocation of power between Article II and Article III branches of government").[11]

B. The Determination Whether An Alien Defendant Is Subject To Deportation For Purposes Of Section 3583(d) Must Be Made Under The Immigration And Nationality Act

Despite the text, purpose, and history of Section 3583(d), the court of appeals declined to adopt what we believe is the most natural reading of the final sentence of Section 3583(d). Instead, the court read into that sentence a grant of jurisdiction to a district court to enter a final deportation order without invocation of the standards or procedures of the INA.

[11] In addition to ensuring that a term of supervised release does not stand as an obstacle to the deportation of an alien defendant, Section 3583(d) serves the government's purpose of establishing an efficient means of reimprisoning an alien defendant who reenters the United States during such term. In addition to authorizing a district court to provide for deportation, Section 3583(d) authorizes a district court to provide that an alien defendant, who is subject to deportation, must remain outside the United States during the period of his supervised release. Consequently, if such an alien defendant reenters the United States, the United States may arrest that alien for violation of a condition of supervised release and reimprison him in accordance with Section 3583(e)(3), without having to pursue a new and independent criminal prosecution under 8 U.S.C. 1326, for unlawful reentry after deportation.

Such a reading runs contrary to Congress's long-standing practice of vesting sole authority to make deportation determinations in the Attorney General and her delegates. It also conflicts with the structure of Section 3583(d), which authorizes a district court to take certain actions with regard to deportation only "[i]f an alien defendant is subject to deportation." 18 U.S.C. 3583(d). Whether an alien is subject to deportation can be answered only by reference to the INA, in which Congress has identified the grounds for deportability and for relief from deportation, as well as the procedures to be followed in determining whether to enter an order of deportation. Consequently, Section 3583(d) and the INA must be construed together so as to give effect to both. See *United States* v. *Sanchez*, 923 F.2d at 237 ("As subsection 3583(d) provides no indication of a contrary legislative design, we read its language *in pari materia* with the provisions of the Immigration and Naturalization Act."); *United States* v. *Phommachanh*, 91 F.3d at 1386 ("18 U.S.C. § 3583(d) and 8 U.S.C. § 1251 are *in pari materia*, and as such, must be read and applied together.").

1. The determinations of whether an alien is deportable and whether an alien is entitled to a waiver of deportation or to other relief from deportation are matters that Congress has assigned, by statute, to the Attorney General (with the exception of 8 U.S.C. 1252a(d), discussed at pp. 33-38, *infra*). See 8 U.S.C. 1251-1254. Congress's assignment of that authority to the Attorney General and her delegates is consistent with the broad authority that Congress has vested in the Attorney General in immigration

matters generally. Section 103(a) of the INA provides, in relevant part:

> The Attorney General shall be charged with the administration and enforcement of this chapter *and all other laws relating to the immigration and naturalization of aliens*, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

8 U.S.C. 1103(a) (emphasis added). In particular, Congress specified that the procedures entrusted to the Attorney General under Section 242 of the INA, 8 U.S.C. 1252, for determination of deportability through an administrative proceeding, subject to judicial review, "shall be the sole and exclusive procedure for determining the deportability of an alien under this section," 8 U.S.C. 1252(b), "[e]xcept as provided in section 1252a(d)" (discussed below).[12] Congress vested the Attorney General with the authority to establish such regulations as she deems necessary for carrying out her authority under the INA. 8 U.S.C. 1103(a). Pursuant to that authority, the

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[12] The procedures that the Attorney General is required to administer under Section 1252 include providing notice to the alien of the charges; permitting the alien to hire a lawyer to represent him; allowing the alien to examine the government's evidence, present his own evidence, and cross-examine government witnesses; and requiring that the deportation determination be based upon substantial evidence. See 8 U.S.C. 1252(b)(1)-(4); see also 8 U.S.C. 1252b.

Attorney General has promulgated regulations to govern, *inter alia*, the proceedings to determine the deportability of aliens and the means for carrying out deportation orders (8 C.F.R. Pts. 242 and 243), as well as the procedures for seeking and granting asylum, withholding of deportation, suspension of deportation, voluntary departure, and adjustment of status to permanent resident (8 C.F.R. Pts. 208, 244 and 245).

As the official charged with administering the INA, the Attorney General's statutory interpretations are entitled to deference. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 445-450 (1987) (analyzing INS's statutory interpretation under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). Her formulation of the standards governing discretionary relief are subject to judicial review only for abuse of discretion. See *INS* v. *Yueh-Shaio Yang*, No. 95-938 (Nov. 13, 1996), slip op. 6; see also *INS* v. *Rios-Pineda*, 471 U.S. 444, 451 (1985) (the INA "commits the definition of the standards in the Act to the Attorney General and his delegate in the first instance, 'and their construction and application of th[ese] standard[s] should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute'" (quoting *INS* v. *Jong Ha Wang*, 450 U.S. 139, 144 (1981) (per curiam))).

Under the standards and procedures of the INA and its implementing regulations, in order to determine whether a person is subject to deportation, one must first ascertain whether the person falls within a class of deportable aliens. Section 241 of the INA, 8 U.S.C. 1251, details the various classes, including aliens convicted of certain criminal offenses. See 8 U.S.C. 1251(a)(2). Classification as a deportable alien does not subject an alien to deportation, however. Certain

grounds of deportation may be waived by the Attorney General under specified circumstances, as a matter of discretion. See, *e.g.*, 8 U.S.C. 1251(a)(1)(E)(iii) and (H), (c). More importantly, many aliens may seek relief from deportation through a number of different statutory provisions. For instance, a deportable alien may seek asylum (8 U.S.C. 1158), withholding of deportation (8 U.S.C. 1253(h)), suspension of deportation (8 U.S.C. 1254(a)(2)), or a determination of nonexcludability (8 U.S.C. 1182(c)). Although an alien must meet certain threshold statutory requirements in each instance, the ultimate determination of whether to grant relief or to subject the alien to deportation is often left to the discretion of the Attorney General. For example, this Court has described the Attorney General's suspension of deportation as "'an act of grace' which is accorded pursuant to her 'unfettered discretion.'" *INS* v. *Yueh-Shaio Yang*, slip op. 4 (quoting *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956)).

Other determinations by the Attorney General are far from discretionary, but rather mandated by provisions of the INA that implement the nation's treaty obligations, or by matters of foreign affairs. For example, if a deportable alien qualifies for withholding of deportation because his life or freedom would be threatened, on account of race, religion, nationality, membership in a particular social group, or political opinion, in the country to which he is to be deported, the Attorney General is statutorily prohibited from effectuating that deportation uniess one of the specified exceptions applies, such as commission of a particularly serious crime that renders him a danger to the community. See 8 U.S.C. 1253(h)(2)(B). The INA also affords the Attorney General the ability

to take into account other law enforcement interests in particular cases that may warrant the presence in this country, for a particular period of time, of an alien who is subject to deportation. See, *e.g.*, 8 U.S.C. 1182(d)(5); 8 C.F.R. 212.14 (providing for temporary parole in the United States of aliens whom a law enforcement authority requires to serve as witnesses or informants in criminal/counter-terrorism matters). Even if the Attorney General determines that an alien is deportable and not entitled to any of the discretionary relief provisions, the Attorney General may decide not to deport the alien if such deportation is not practicable, advisable or possible. See 8 U.S.C. 1252(c).

In light of the structure and history of the laws governing immigration and the role of the Executive Branch in conducting foreign affairs, it would be exceptional for Congress to have granted jurisdiction to district courts to decide matters that would have direct international implications by necessitating the transport of a person from this country to foreign soil, without requiring the consent of, or consultation with, the Attorney General. This Court previously has recognized that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952); see also *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-543 (1950) (the power to exclude aliens from the United States "is inherent in the executive power to control

the foreign affairs of the nation," and "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien"). Moreover, the grant of authority to the Attorney General to initiate deportation proceedings and to make deportation determinations is consistent with her general discretion regarding decisions to enforce the law, as well as the presumptive authority of Executive agencies to make nonenforcement decisions that are not subject to judicial review. See *Heckler* v. *Chaney*, 470 U.S. 821 (1985); cf. *Morrison* v. *Olson*, 487 U.S. 654 (1988).

2. a. The references to deportation in the final sentence of Section 3583(d) do not carve out an exception to that statutory scheme and long tradition of Attorney General authority in the realm of deportation. It is extremely unlikely that Congress, in a single sentence in Section 3583(d) that merely allows a district court to "provide" that an alien be deported, intended to repeal by implication the entire INA in a particular category of cases and to exempt those cases from the Attorney General's exclusive authority over deportation matters. It is also unlikely that Congress intended that Section 3583(d) render certain aliens altogether ineligible for relief from deportation under the INA provisions relating to asylum, withholding of deportation, and the like. But that would be the necessary result of the Eleventh Circuit's interpretation.[13]

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[13] Section 3583(d) contains no provision for the sentencing court to consider requests for asylum or other relief, nor does it authorize the court to exercise discretion to grant waivers of deportation as the INA authorizes the Attorney General to

Section 3583(d) should, instead, be interpreted to give effect to both its purpose and the purposes of the comprehensive provisions of the INA. As other courts of appeals have concluded, read *in pari materia* with the INA, Section 3583(d) can only be interpreted as authorizing the sentencing court to provide, as a condition of supervised release, that an alien defendant who is subject to deportation, *i.e.*, an alien who has been or will be ordered deported by the Attorney General under the INA, "be surrendered to immigration officials for deportation proceedings under the [INA] * * * for the purpose of determining whether he is 'an alien defendant . . . subject to deportation'" and for such deportation. *United States* v. *Sanchez*, 923 F.2d at 237; see also *United States* v. *Phommachanh*, 91 F.3d at 1386 (same).

That interpretation of Section 3583(d) "is consistent with the overall division of responsibility that Congress created between the INS and the courts." *United States* v. *Phommachanh*, 91 F.3d at 1386 (quoting *United States* v. *Xiang*, 77 F.3d at 772-773). As numerous courts of appeals have recognized, it preserves Congress's long tradition of granting the

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do. In order to effectuate the INA along with Section 3583(d), a district court would have to devise some means of replicating the administrative deportation hearing process or would have to stay its proceedings to afford an alien an opportunity to seek such relief through the INA structure. The Eleventh Circuit has not required that district courts provide alien defendants with an opportunity to seek such relief from deportation, however. The court of appeals recently affirmed a district court's refusal of an alien's request that it withhold its judicial deportation order to allow the INS to determine whether the alien was eligible for asylum under the INA. *United States* v. *Oboh*, 92 F.3d at 1083-1084.

Attorney General sole power to initiate deportation determinations. See *id.* at 1386-1387; *United States* v. *Quaye*, 57 F.3d at 449-450; cf. *United States* v. *Kassar*, 47 F.3d at 568 (decision to deport rests in sound discretion of Attorney General). It is consistent with the understanding that "the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953).[14] As the Fifth Circuit reasoned, courts should not assume "that Congress intended to undermine th[e] executive prerogative *sub silentio* in § 3583(d), or that Congress intended by its silence to deprive aliens deported at sentencing of such relief as alien asylum, which the Attorney General may grant." *United States* v. *Quaye*, 57 F.3d at 450. The Court should "insist on greater clarity of purpose when a statute would be read to upset a status quo long in place." *Ibid.*

b. The court of appeals erred in reading former provisions of the INA, which provided for judicial recommendations against deportation, as evidencing a congressional intent to enable district courts to enter orders directly deporting aliens. See *United States* v. *Oboh*, 92 F.3d at 1086-1087. The *Oboh* en banc majority cited former Section 155 of Title 8 (1940), which

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[14] In fact, Congress recently provided that discretionary decisions and actions by the Attorney General under the INA will no longer be subject to judicial review. See IIRAIRA § 306(a) (*reproduced at* 138 Cong. Rec. H11,803 (daily ed. Sept. 28, 1996)) (effective date April 1, 1997, see IIRAIRA §§ 306(c)(1), 309(a) (*reproduced at* 138 Cong. Rec. H11,804, H11,808 (daily ed. Sept. 28, 1996)) (as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657)).

provided that, in the case of an alien whose deportability was based on a conviction of a crime involving moral turpitude, the alien was not to be deported if the alien had been pardoned or if the sentencing court recommended against his deportation, after having given due notice to the responsible Executive Branch officials. The court noted that the pertinent part of Section 155 was replaced by Section 241(b) of the INA, 8 U.S.C. 1251(b) (1952). Section 1251(b) provided that the provision rendering an alien deportable on account of having committed certain crimes involving moral turpitude (Section 241(a)(4) of the INA, 8 U.S.C. 1251(a)(4) (1952)), did not apply if the alien was pardoned or if the sentencing court recommended against deportation, after having given notice to the INS, the prosecuting authorities, and the interested State, and after having provided those officials with an opportunity to make representations to the court on the matter.

Section 1251(b) did not prohibit the Attorney General from deporting any aliens, however, but merely authorized a sentencing court to preclude the INS from using a particular conviction as the statutory basis for finding the alien deportable under Section 1251(a). The Attorney General retained the authority to deport the alien on any other basis authorized under the INA. See *United States* v. *Quintana*, 914 F.2d 1409, 1410-1411 (10th Cir. 1990) (Section 1251(b) is inapplicable to deportation based on any ground other than Section 1251(a)(4)); *Jew Ten* v. *INS*, 307 F.2d 832 (9th Cir. 1962), cert. denied, 371 U.S. 968 (1963); *United States* v. *George*, 534 F. Supp. 570, 571 (S.D. N.Y. 1982). The Attorney General also retained the authority to consider the conduct underlying the conviction, and weigh it as an adverse factor

against the alien, when exercising her discretion whether to grant relief from deportation under the INA. See *Hassan* v. *INS*, 66 F.3d 266, 269 (10th Cir. 1995); *Delgado-Chavez* v. *INS*, 765 F.2d 868, 869 (9th Cir. 1985) (prior conviction that Section 1251(b) precluded from serving as basis for deportation nonetheless "may be considered as an adverse factor [by the Attorney General's delegates] in deciding whether the favorable exercise of discretion is warranted"); *Oviawe* v. *INS*, 853 F.2d 1428, 1431-1434 (7th Cir. 1988); *In re Gonzalez*, 16 I. & N. Dec. 134, 135 & n.1 (BIA 1977). But see *Giambanco* v. *INS*, 531 F.2d 141, 147-149 (3d Cir. 1976). Even more significantly, former Sections 155 and 1251(b) did not authorize a district court to initiate deportation proceedings against an alien and did not grant a district court jurisdiction to enter a deportation order against an alien as part of a criminal sentence.

3. The fact that Congress did not intend, through the single sentence in Section 3583(d), to carve out a category of cases in which judicial orders of deportation are authorized is evident when Section 3583(d) is compared to a later enacted provision, 8 U.S.C. 1252a(d) (renumbered by the IIRAIRA as Section 238(c) of the INA (to be codified at 8 U.S.C. 1228(c))), in which Congress explicitly authorized judicial orders of deportation in certain cases, according to certain procedures.

a. In 1994, Congress added subsection (d) to Section 242A of the INA to provide that a district court "shall have jurisdiction to enter a judicial order of deportation at the time of sentencing" against certain criminal aliens in particular cases. 8 U.S.C.

1252a(d)(1).[15] See Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 224(a), 108 Stat. 4322-4323.[16] Congress included that provision as part of the INA, not as part of the criminal code, and was explicit in establishing district court jurisdiction to enter deportation orders (*i.e.*, court "shall have jurisdiction to enter a judicial order of deportation"). Moreover, Congress created a mechanism that preserves the Attorney General's

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[15] Aliens to whom Section 1252a(d), as enacted in 1994, applies are those convicted of certain crimes of moral turpitude, those with multiple criminal convictions involving moral turpitude, and those convicted of an aggravated felony. See 8 U.S.C. 1251(a)(2)(A); *United States* v. *Quaye*, 57 F.3d at 450 n.2; *United States* v. *Phommachanh*, 91 F.3d at 1386. The IIRAIRA subsequently amended Section 242A(d) of the INA, 8 U.S.C. 1252a(d) (and renumbered it as Section 238(c) of the INA (to be codified at 8 U.S.C. 1228(c))), apparently intending to broaden its applicability to all criminal cases involving deportable aliens and to narrow the circumstances in which a court order would have preclusive effect in an administrative proceeding. See IIRAIRA § 374(a) (*reproduced at* 138 Cong. Rec. H11,813-H11,814 (daily ed. Sept. 28, 1996)).

[16] Before the amendment authorizing judicial deportation orders, Congress had addressed the issue of deportation of criminal aliens by enacting Section 1252a of Title 8 in 1988 to provide for expedited deportation proceedings at correctional facilities for aliens convicted of aggravated felonies to ensure "expeditious deportation, where warranted, following the end of the alien's incarceration for the underlying sentence." 8 U.S.C. 1252a(a)(1) (1988). See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7347, 102 Stat. 4471. Earlier in 1994, Congress had amended Section 1252a to create expedited administrative procedures for the deportation of aliens who are not lawfully admitted to the United States, have committed an aggravated felony, and are not eligible for relief from deportation. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130004, 108 Stat. 2026-2028.

authority to initiate deportation by conditioning the district court's jurisdiction to deport an alien in a particular case on a request "by the United States Attorney with the concurrence of the Commissioner [of the INS]" to enter a judicial deportation order in that case. 8 U.S.C. 1252a(d)(1).

Congress established detailed procedures to be followed by the United States Attorney, the INS Commissioner, and the court in making a request for judicial deportation and in deciding whether to enter such an order. The procedures incorporate the essential safeguards of INA administrative proceedings (see note 12, *supra*) and permit aliens to seek relief from deportation under the INA. The United States Attorney must provide notice, before trial or entry of a plea, to the court and the alien defendant of an intent to request judicial deportation. 8 U.S.C. 1252a(d)(2)(A). After conviction, but 30 days before sentencing, the United States Attorney, with the concurrence of the INS Commissioner, must file a charge "containing factual allegations regarding the alienage of the defendant and identifying the crime or crimes which make the defendant deportable under section 1251(a)(2)(A)." 8 U.S.C. 1252a(d)(2)(B). If the alien defendant establishes prima facie eligibility for relief from deportation under the INA, the INS Commissioner must provide the sentencing court with a recommendation and report on the alien's eligibility for relief, and the court is expressly authorized to then "either grant or deny the relief sought." 8 U.S.C. 1252a(d)(2)(C). The alien defendant is afforded the right to examine the evidence against him or her, to present evidence, and to cross-examine government witnesses. 8 U.S.C. 1252a(d)(2)(D)(i). The court's deportation order can be based on consid-

eration only of evidence that would be admissible in an administrative deportation hearing under the INA. 8 U.S.C. 1252a(d)(2)(D)(ii). Congress explicitly stated that a district court "may order the alien deported if the Attorney General demonstrates that the alien is deportable" under the INA. 8 U.S.C. 1252a(d)(2) (D)(iv).[17] Finally, Congress preserved the Attorney General's authority to initiate administrative deportation proceedings against the alien defendant under the INA, upon the same ground or other grounds of deportability, notwithstanding a district court's denial of a request for a judicial order of deportation under Section 1252a(d), so long as the district court did not issue a decision on the merits of the request. 8 U.S.C. 1252a(d)(4).

The explicit limitation of the district court's authority to cases in which the Attorney General's delegates seek judicial deportation, and the detailed procedures and standards set forth to govern judicial deportation orders, are wholly absent from Section 3583(d) of Title 18.[18] Thus, if Section 3583(d) is interpreted to allow a district court to order an alien

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[17] Under Section 1252a(d), an alien defendant and the United States have the right to appeal from a grant or a denial of judicial deportation and that appeal is governed, as a general matter, by the provision of the INA that governs judicial review of the Attorney General's final administrative orders of deportation. See 8 U.S.C. 1252a(d)(3)(A).

[18] We do not agree with petitioner or his *amici* (see, *e.g.*, Pet. Br. 24-27) that, if Section 3583(d) were interpreted to grant district courts authority to enter judicial orders of deportation, constitutional problems would arise. If district courts were granted such jurisdiction, we are confident that they would afford alien defendants the necessary procedural safeguards to meet constitutional due process standards.

defendant deported as a condition of supervised release, the result would be an "illogical set of judicial deportation rules." *United States* v. *Phommachanh*, 91 F.3d at 1387; *United States* v. *Quaye*, 57 F.3d at 450 (reading Section 3583(d) to authorize judicial deportation orders "would create an extraordinary set of rules"). Section 3583(d) would permit judicial deportation of any deportable aliens without the specific procedural safeguards Congress has provided in the INA, while 8 U.S.C. 1252a(d) would protect deportable aliens convicted of particularly heinous crimes with those detailed procedural safeguards. *United States* v. *Phommachanh*, 91 F.3d at 1387; *United States* v. *Quaye*, 57 F.3d at 450. In addition, such a reading of Section 3583(d) would "allow[] broader judicial deportation than that allowed by the subsequently enacted § 1252a(d)," thereby rendering Section 1252a(d) meaningless. *United States* v. *Phommachanh*, 91 F.3d at 1387; *United States* v. *Xiang*, 77 F.3d at 773.

Congress must be presumed not to have performed such "a useless act" in enacting Section 1252a(d). *United States* v. *Phommachanh*, 91 F.3d at 1387 (quoting 2B Norman J. Singer, *Sutherland Statutory Construction* § 49.11, at 83 (5th ed. 1992)). Like the Tenth Circuit, this Court should decline to "interpret § 3583(d) in such a way as to create this nonsensical combination of judicial deportation rules." *Ibid.*

b. Congress's amendment, in 1996, of the INA provisions regarding judicial deportation orders further demonstrates that Section 3583(d) should not be interpreted to authorize entry of a judicial deportation order as a condition of supervised release. Section 374(a)(3) of the IIRAIRA added a new subsection to Section 242A of the INA, 8 U.S.C. 1252a (renumbered by the IIRAIRA as Section 238 of the INA

(to be codified at 8 U.S.C. 1228)), that authorizes stipulated orders of deportation via plea agreements whereby the alien defendant agrees to a judicial order of deportation as a condition of a plea agreement or as a condition of probation or supervised release. See 138 Cong. Rec. H11,813-H11,814 (daily ed. Sept. 28, 1996) (to be codified at 8 U.S.C. 1228(c)(5)). Such stipulated orders of deportation are authorized, however, only in cases where the United States Attorney has obtained the concurrence of the Commissioner of the INS to enter into the plea agreement and the stipulation. *Ibid.* The IIRAIRA also explicitly grants a district court "jurisdiction to enter a judicial order of deportation pursuant to the terms of such stipulation." *Ibid.* Moreover, Section 374(b)(3) of the IIRAIRA amended the criminal code relating to probation to provide that a court may order an alien deported as a condition of probation either pursuant to such a stipulation under the INA or "if, after notice and hearing pursuant to [8 U.S.C. 1228(c)], the Attorney General demonstrates by clear and convincing evidence that the alien is deportable." See 138 Cong. Rec. H11,814 (daily ed. Sept. 28, 1996) (to be codified at 18 U.S.C. 3563(b)(21)).

The IIRAIRA did not, however, amend the criminal code relating to conditions of supervised release in a similar manner. Thus, Section 3583(d) still contains only a single sentence authorizing a district court to "provide" that an alien defendant be deported as a condition of supervised release, without any explicit grant of jurisdiction to the district court to enter a judicial order of deportation, without any provision for consultation with, or a request from, the United States Attorney or the Commissioner of the INS, and without any of the procedural safeguards contained in

the other provisions governing deportation determinations. Under those circumstances, it would be unreasonable to construe Section 3583(d) to effect a similar change regarding the authority of district courts in deportation matters vis-a-vis the authority of the Attorney General.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
BETH S. BRINKMANN
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THOMAS M. GANNON
Attorney

NOVEMBER 1996

APPENDIX

Section 3583 of Title 18 provides, in relevant part:

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) IN GENERAL.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) AUTHORIZED TERMS OF SUPERVISED RELEASE.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

* * * * *

(d) CONDITIONS OF SUPERVISED RELEASE.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of

supervision and that the defendant not unlawfully possess a controlled substance. * * * The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

* * * * *

(7)

Supreme Court, U.S.
FILED
DEC 27 1996
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No. 95-8736

In The

Supreme Court of the United States

October Term, 1996

LARRY OSA OGBOMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S RESPONSE TO SUGGESTION OF MOOTNESS

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Rule 21, Rules of Supreme Court 1

Pursuant to Rule 21 of the Rules of this Court, petitioner opposes the United States' Suggestion of Mootness.

I. The Petitioner Did Not Receive a Full and Fair Immigration Hearing.

The Solicitor General, contends that Mr. Ogbomon did not challenge the deportation findings by the administrative judge.[1] Suggestion of Mootness ("Suggestion") p. 7 n.4. In preparation for this response, we discovered that Mr. Ogbomon moved to reopen the findings of the court, but his motion was denied. Not only was he **not present and unrepresented** at the hearing, his former counsel submitted an affidavit detailing that he had mailed the notice to the petitioner at the wrong address, and when the notice was returned, he followed his regular procedure of keeping the notice on file in his office. **See** Declaration of R. Travis Douglas. So while it is true that his request for rehearing was denied, he made an affirmative effort to fight that determination. The fact that he was not present and unrepresented certainly shows that he did not receive the procedural guarantees under the INA. Thus, he received neither a notice nor a meaningful opportunity to be heard on the issue of his

---

[1] Petitioner failed to include the facts surrounding the question of mootness in his Petition for Writ of Certiorari. The petitioner did not learn of the supervised release revocation until after the petition was filed. While Mr. Spencer represented Mr. Ogbomon below, and co-authored the pleadings before this Court with Ms. Hashimi, Mr. Ogbomon was represented by separate counsel in both the Alabama and supervised release revocation cases. Counsel regrets this unintentional omission.

deportation at his sentencing hearing, the procedure that the Eleventh Circuit has found sufficient.[2]

II. The Question of Whether §3583(d) Permits Judicial Orders of Deportation is Intrinsically Intertwined with the Issue of Mootness.

In this case the question of mootness is intrinsically intertwined with the merits. The issue of whether the revocation of supervised release nullifies the effect of a judicial order of deportation cannot be answered without first determining what, if any, effect such an order would have. As the Solicitor General acknowledged in its brief on the merits, "it is unclear whether the district court contemplated that petitioner would be deported under the original sentence . . . now that petitioner's supervised release has been revoked." U.S. Br. 6. The respondent erroneously relies on *United States v. Tatum*, 998 F.2d 893, 895 (11th Cir. 1993) (per curiam), for the proposition that the case is moot. Suggestion p. 3. But *Tatum* held *only* that after a revocation of supervised release the district court could not impose an additional term of supervised release.[3] *Tatum*, 998 F.2d at 895. There clearly was no discussion of whether a judicial order of deportation would survive the revocation of supervised release.

---

[2] See *United States v. Oboh*, 92 F.3d 1082, 1087 (11th Cir. 1996), asserting that while the procedural protections at a sentencing hearing and an administrative hearing are not equal, it was up to Congress to make the necessary changes.

[3] The statute has since been amended by Congress. 18 U.S.C. §3583(h).

At the time Mr. Ogbomon was sentenced, the district court ordered that he receive a term of supervised release in addition to his custodial sentence. In this regard, the order of deportation constituted a "punishment." It seems unlikely that a district court would intend for an alien to avoid this penalty by engaging in conduct that would result in a revocation of his supervised release. Thus, the petitioner submits this is an issue that particularly warrants review, since the question of mootness turns on the question presented by the merits. *See Honig v. Doe*, 484 U.S. 305, 329 (1988) (Rehnquist, C.J. concurring) (suggesting that once a case is before the Supreme Court, the unique nature of the Supreme Court, being "the last word on every important issue under the Constitution and statutes of the United States," may warrant an abandonment of the doctrine of mootness.)

III. The Interpretation of the Recently Enacted IIRAIRA Does Not Militate in Favor of Mootness.

In the Solicitor General's Suggestion of Mootness he suggests that §304(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA")[4] has the effect of overruling the court of appeals decision in this case. Sugg. of Mootness, p. 10. While this is consistent with the petitioner and the government's position in this matter, it is not clear that §304(a)(3) of IIRAIRA *necessarily* overrules the Eleventh Circuit's interpretation of 18 U.S.C. §3583(d).

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[4] All Code citations refer to Title 8 prior to the enactment of IIRAIRA.

As a matter of statutory construction, Congress is assumed to be aware of existing law when it passes legislation. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). The Eleventh Circuit's decision in *United States v. Chukwura*, 5 F.3d 1420 (1993), was the first court of appeals ruling to interpret 18 U.S.C. §3583(d) to allow a judicial order of deportation. This statute existed several years prior to the 1996 enactment of IIRAIRA. Since IIRAIRA makes no mention of 18 U.S.C. §3583(d), or any effect the statute could have on supervised release or the criminal statutes, IIRAIRA cannot be said to necessarily overrule the court of appeals.

Moreover, repeal by implication is disfavored, *Crawford Fitting Company v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), and will not be found unless the intent to repeal is clear and unambiguous. *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (per curiam). Unless there is some affirmative showing of an intention to repeal, the only permissible justification for repeal by implication is when the earlier and later statutes are irreconcilable. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978). While the language of the IIRAIRA may seem plain, the difference in future parties' interpretations may bring about the same dispute here – what the language of the statute means. Because Congress did not specifically mention 18 U.S.C. §3583(d) with §304(a) of IIRAIRA, it is premature, respectfully, to find that the subsequent legislation favors mootness.

The most compelling reason to determine this matter on the merits is because of the pendency of cases that will be decided prior to the effective date of IIRAIRA. There

are two cases already pending before the Court, *Oboh v. United States*, No. 96-6653, and *Bowen v. United States*, No. 96-6658. As the Eleventh Circuit is the only circuit that has taken this course of action, there is no reason to believe that the district courts would cease this practice without a ruling from this Court. The fact that alien defendants in one lone circuit are treated so disparately from those in the other circuits creates an intolerable constitutional difference.

IV. There Are Collateral Consequences to Mr. Ogbomon Which Militate Against Mootness.

A criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction. *Sibron v. New York*, 392 U.S. 40, 57 (1968). The doctrine of mootness will not apply where civil disabilities flow from the conviction, *Carafas v. LaValle*, 391 U.S. 234 (1968), and will not lie where it is possible that the challenged conviction may result in an enhanced criminal history, *Minnesota v. Dickerson*, 508 U.S. 366, 371 n.2 (1993), or where the conviction may be used to impeach future testimony. *Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985). There are significant civil and criminal consequences to the district court's order below.

a. Whether this judicial order of deportation is valid maintains seminal import in petitioner's challenge to the finding of deportability made by the administrative judge. Mr. Ogbomon's INS file contained his judgment and commitment order entered on August 30, 1991 which contained this judicial order of deportation.

First, there is no indication that this order was not considered at the time the initial determination was made and at the time he sought to have the record reopened. Petitioner's position is supported by the fact that it is the current practice, in the Eleventh Circuit, for administrative judges to give great deference to these judicial orders of deportation.[5] Thus, it is clear that a finding in petitioner's favor, on the merits, would aid petitioner's continuing challenge to this INS finding of deportability.

Second, this administrative finding of deportability was made based on petitioner's conviction for reentering the country after deportation. However, the deportation in that case was also a judicial order of deportation made under §3583(d). Thus, if petitioner were to prevail on the merits here, the very basis for the administrative finding of deportability and his criminal conviction would be undermined. *See U.S. v. Chukwura*, 101 F.3d 230 (2nd Cir. 1996)

The United States Sentencing Guidelines ("U.S.S.G.") apply to immigration offenses. U.S.S.G. Part. L. U.S.S.G. §2L1.2 specifically applies to the crime of unlawfully entering or remaining in the United States, and the commentary, at note 2, provides that "in the case of a defendant with repeated prior instances of deportation without criminal conviction, an upward departure may be warranted." U.S.S.G. §2L1.2, Comment (n.2). The district

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[5] *See In The Matter of Nigel Roger Caines*, Deportation Proceeding of 11/25/96, File A 42-081-339 (attached as appendix A), where the Immigration Judge held that an order of deportation under §3583(d) was binding on immigration judges and thus divested him of jurisdiction to set bond.

court's deportation order at issue could well subject him to an upward departure in the future. *See Minnesota v. Dickerson, supra.*

b. This Court has refused to extend the doctrine of mootness where an alien would suffer adverse consequences from a conviction where he had already served his sentence. *See Fiswick v. United States*, 329 U.S. 211 (1946).

In *Fiswick* it was noted that an alien sentenced to imprisonment of one year or more because of a conviction of any crime of moral turpitude is subject to deportation if the crime was committed within five years of the alien's entry into the United States. *Id.*, at 221. Because the judgment provided "unimpeachable evidence" that Fiswick had committed the crime charged, he would be denied his best defense, that he was not properly convicted, in defending his deportation order, leaving him only to argue that the crime was not one of "moral turpitude." *Fiswick*, 329 U.S. at 221-222.

The Court also noted that other disabilities could flow from an improperly obtained judgment against Fiswick, an alien. The conviction would burden an attempt at naturalization, since he would have to establish that during the five years preceding his petition for naturalization he "ha[d] been and still is a person of good moral character." 54 Stat. 1137, 1142, 8 U.S.C. §707(a)(3). Such a conviction would impair his ability to meet that standard. *Fiswick*, 329 U.S. at 222. And even if he was successful in his naturalization attempt, he would be burdened with a felony conviction which could result in the loss of civil rights. *Id.* (footnote omitted). "Thus,

Fiswick ha[d] a substantial stake in the judgment of conviction which survive[d] the satisfaction of sentence imposed on him." *Fiswick*, 329 U.S. at 229. *See also Pollard v. United States*, 352 U.S. 354, 358 (1951) (recognizing that petitioner's claim was not moot because of the collateral consequences, even though he was appealing the sentence, not the conviction). Because deportation may result in the loss "of all that makes life worth living," *Fiswick*, 329 U.S. at 222, note 8 (citations omitted), Mr. Ogbomon should be heard on this matter.

c. Further, there are a number of provisions under the Immigration and Naturalization Act ("INA") that would be implicated by the district court's order of deportation. An alien who has previously been deported is ineligible to receive a visa and is excludable. 8 U.S.C. §1182(a)(6)(A). Title 8 U.S.C. §1101(f) provides that, under specific circumstances, a person cannot be regarded as having "good moral character." *Id.* The statute also excepts persons who have been imprisoned for more than 180 days from being of "good moral character." §1101(f). Even beyond these particular exclusions, the statute provides that "the fact that any person is not within the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character." *Id.* Any deportation makes it more difficult for an alien to legally reenter, so subsequent deportation orders adversely affect the petitioner.

Furthermore, under some circumstances the Attorney General has the discretion to allow an alien to voluntarily depart from the United States in lieu of deportation, if the alien can establish that he was a person of good moral character at least five years prior to the application for

voluntary departure. 8 U.S.C. §1254(e). A decision by the Immigration and Naturalization Service to permit voluntary departure in lieu of deportation is highly discretionary. *See Molina v. INS*, 981 F.2d 14 (1st Cir. 1992). The decision to grant an alien permission to reapply after deportation within the last five years is with the Attorney General. *United States v. Forty-Five Thousand Nine Hundred Forty Dollars ($45,940) in U. S. Currency*, 739 F.2d 791 (2nd Cir. 1984). Moreover, if the Attorney General decides that relief should be denied as a matter of discretion, he need not consider whether the statutory eligibility requirements are met. *INS v. Rios-Pineda*, 471 U.S. 444 (1985). Since deportation affects the decision to reapply, it is clear that the petitioner has a "substantial stake in the judgment of conviction that survives the satisfaction of the sentence imposed on him. *Carafas*, 391 U.S. at 237, quoting *Fiswick v. United States*, 329 U.S. 211 (1946). The significant burdens placed on the petitioner by the INA make a mootness finding inappropriate.[6] *See also* 8 U.S.C. §1101(f) (defining when a person is of "good moral character" for the purposes of the INA.

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[6] While this Court found that mootness dictated dismissal in *Lane v. Williams*, 455 U.S. 624 (1982), where the petitioner had served the entire sentence of his parole term, mootness was predicated on the fact that there could be "no further detention or restraint as a result of the mandatory parole term." 455 U.S. at 629, note 8. Because of the severe consequences of the INA, *Lane* is not applicable.

CONCLUSION

The petitioner requests that the Court determined the case on the merits and reverse the judgment of the court of appeals.

Respectfully submitted,

Suzanne Hashimi
R. Gary Spencer
Stephanie Kearns

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge

File A 42-081-339

In the Matter of Nigel Roger Caines, Respondent.	)	In Deportation Proceedings **Order of the Immigration Judge**

Respondent is being held by the INS pursuant to an order entered by the U.S. District Court (N.D. GA). This Court is without jurisdiction to set bond in such a case.

Accordingly, Respondent's request for bond is hereby DENIED for want of jurisdiction.

Date: 11-25-96 /s/ Illegible
Place: Atlanta GA (*Immigration Judge*)

Supreme Court, U.S.
FILED
DEC 20 1996
CLERK

(8)

No. 95-8736

In the Supreme Court of the United States

OCTOBER TERM, 1996

LARRY OSA OGBOMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUGGESTION OF MOOTNESS

WALTER DELLINGER
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Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-8736

LARRY OSA OGBOMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUGGESTION OF MOOTNESS

Pursuant to Rule 21 of the Rules of this Court, the Acting Solicitor General, on behalf of the United States, suggests that the Court dismiss this case as moot.

The question presented in this case is whether 18 U.S.C. 3583(d) authorizes a district court to order a criminal defendant deported, as a condition of supervised release, without recourse to the standards and procedures for determining deportability and relief from deportation under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and implementing regulations. That question is based on petitioner's challenge to a condition of supervised release imposed by the district court at his original sentencing. The court of appeals affirmed that condition in a judgment entered on May 5, 1995. Petitioner's

petition for rehearing was denied on January 22, 1996. Since the denial of rehearing, however, on April 10, 1996, the district court has entered an order revoking petitioner's supervised release and ordering his imprisonment, without imposing any new term of supervised release. See U.S. Br. 6-7. Petitioner's sentence in this case thus no longer includes a term of supervised release. Nor does his sentence include the deportation condition formerly imposed on that revoked term of supervised release. The revocation of petitioner's supervised release by the district court thus renders the case moot.

1. This Court's "lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964). As the Court has recognized, "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) (per curiam).

Petitioner's challenge to the condition of his supervised release that he be deported cannot "affect the rights of litigants in the case before" this Court, 404 U.S. at 246, because the challenged order of deportation was imposed as a condition on a supervised release term that has been revoked. None of the conditions of that revoked term of supervised release are in force at this time, including the condition that petitioner be deported. Petitioner has thus obtained the key relief that he seeks in this case—vacation of the condition of his supervised release term that required his deportation and precluded him from appealing or resisting any order of deportation by the

Immigration and Naturalization Service. Petitioner did not appeal from the order revoking his supervised release, and, accordingly, that term cannot be reinstated.

In our brief on the merits, we noted that it was unclear whether the district court had contemplated that petitioner would be deported under the original sentence upon completion of the term of imprisonment imposed on revocation. We also noted that the Eleventh Circuit had not, apparently, determined whether an order of judicial deportation, under its interpretation of Section 3583(d), may be carried out after the revocation of supervised release and the completion of the term of reimprisonment, when no new term of supervised release was imposed. U.S. Br. 6. We now believe that neither the district court nor the court of appeals could give any operative effect to the deportation condition that was part of the revoked term of supervised release in this case.

The Eleventh Circuit has expressly stated that a revoked term of supervised release "no longer exists." *United States* v. *Tatum*, 998 F.2d 893, 895 (1993). Thus, when the sentencing court in this case revoked petitioner's supervised release, that term of supervised release, and its conditions, ceased to exist.[1] To our knowledge, no court has suggested

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[1] In *Tatum*, the court held that, under former law, the sentencing court was without statutory authority to reimpose a new term of supervised release to follow imprisonment ordered upon revocation of supervised release. We do not agree with the holding of *Tatum* on that issue; in our view, a court operating under former law did have the power to reimpose a new term of supervised release to follow a term of imprisonment ordered upon revocation of supervised release. We agree with *Tatum*, however, that upon revocation, the

that a revoked term of supervised release automatically carries forward to be served later. Rather, if a supervised-release violator is required to serve a term of imprisonment as a result of his violation, any further supervised release must be expressly ordered by the sentencing court at the time of revocation. That did not occur here.

Absent any continuing existence of the condition that petitioner challenges, no live controversy remains, and the case is nonjusticiable under Article III of the Constitution. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546 (1976); *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975). An actual controversy must exist at all stages of appellate review, including in this Court. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 389 (1994); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). Because a live controversy no longer exists in this case, the case has become moot.[2]

2. This Court has recognized that an exception to usual mootness principles may be applied in cases that are capable of repetition, yet evading review.

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original term of supervised release "no longer exists." Since *Tatum*, Congress has clarified, in 18 U.S.C. 3583(h), that, when a court revokes supervised release, it may order a defendant to be placed on a new term of supervised release to begin after the completion of imprisonment. The sentencing court in this case did not invoke Section 3583(h) when it revoked petitioner's supervised release and ordered him imprisoned.

[2] Indeed, because petitioner's supervised release was revoked on April 10, 1996, the case became moot before the petition for a writ of certiorari was filed in this Court on April 19, 1996. This Office did not become aware of the revocation of petitioner's supervised release until after the Court granted certiorari on October 1, 1996.

The Court has also reviewed challenges involving criminal sentences even after completion of the sentence if the challenged provision has collateral legal consequences. Neither basis for finding an exception to the mootness doctrine exists in this case.

a. In the brief filed by the amicus curiae invited by this Court to defend the judgment of the court of appeals, amicus suggests that, because a similar deportation condition is included as a term of supervised release to which petitioner has been sentenced in another criminal case in another federal district court, this case falls within the mootness exception for controversies that are capable of repetition, yet evading review. See Br. of Court-invited Amicus Curiae 5 n.4. To come within that exception, two showings are necessary: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam). Neither condition is met in this case.

On March 18, 1996, petitioner was charged in the United States District Court for the Northern District of Alabama with commission of bank fraud. Petitioner ultimately was indicted on that and other federal charges, entered a guilty plea to the indictment, and was sentenced by that court to 24 months' imprisonment, to be followed by five years' supervised release. U.S. Br. 7 n.5. The court ordered, *inter alia*, as a condition of supervised release, that petitioner be deported immediately upon completion of his term of imprisonment, in accordance with Section 3583(d), and that petitioner be delivered to an authorized INS official for execution of the deportation order. *Ibid.*

The Alabama district court order does not demonstrate that petitioner, "the complaining party" in this case, is likely to be subject again to the same action that he challenges here. *Weinstein* v. *Bradford*, 423 U.S. at 149. The legal issues raised by the Alabama judgment are not identical to the legal issues raised in this case. By the time of the sentencing by the Alabama district court, an immigration judge had entered an order of deportation against petitioner under the INA, 8 U.S.C. 1101 *et seq.*, and had issued a warrant directing the INS to arrest and deport petitioner. See U.S. Br. 6 n.4. Petitioner did not appeal the immigration judge's order and was thus under a final order of deportation under the INA, see *Stone* v. *INS*, 115 S. Ct. 1537 (1995); an immigration judge had also denied his motion to reopen his deportation proceedings. See U.S. Br. 6 n.4. When an alien defendant is under a final deportation order pursuant to the INA and an immigration judge has ordered him to be arrested and deported, the Attorney General already has made her final determination, under the standards and procedures of the INA, that the alien is subject to deportation under the INA. See *id.* at 30 (indicating that an alien subject to deportation for purposes of Section 3583(d) is "an alien who *has been* or will be ordered deported by the Attorney General under the INA") (emphasis added). An order of judicial deportation under Section 3583(d) entered *after* a final administrative order of deportation raises different legal issues from those raised by the instant case. Cf. *Murphy* v. *Hunt*, 455 U.S. 478, 481 n.5 (1982) (per curiam) (defendant's challenge to limitation on pretrial bail was moot after his conviction; even if the defendant had challenged limitations on bail pending

appeal, that claim involved different legal considerations).

Nor does a challenge to the validity of a judicial deportation order involve a condition that is "too short" in duration to permit complete review in the federal judicial system before its expiration. *Weinstein* v. *Bradford*, 423 U.S. at 149. Petitioner is entitled to appeal a sentence, and he could have appealed the sentence imposed by the Alabama district court, including the judicial order of deportation imposed as a condition of supervised release.[3] If a defendant (such as petitioner) anticipates that he will complete his term of imprisonment and then face deportation under a term of supervised release before completion of the entire appellate process (including any review by this Court), the defendant may seek to protect his ability to obtain relief by requesting a stay of the judicial deportation order. Any failure on a defendant's part to take advantage of the available means to protect an appeal of his sentence would not justify application of the mootness exception for controversies that evade judicial review, because any loss of direct appeal rights could be avoided.[4] Indeed, at least one petition raising the legal issue presented here did reach this Court without becoming moot.

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[3] To our knowledge, petitioner had not filed a notice of appeal from his sentence in the Alabama district court within the time allowed by Fed. R. App. P. 4(b). The finality of that sentence thus makes it doubtful that any favorable resolution of the underlying legal issue in this case would help petitioner in that case.

[4] Petitioner, of course, is under an independent final order of deportation issued under the INA. Petitioner did not seek review of that order or invoke procedures that would operate to stay it. See 8 U.S.C. 1105a(a)(3) (1994).

See *Chukwura* v. *United States*, cert. denied, 115 S. Ct. 102 (1994) (No. 93-8962); see 93-8962 U.S. Br. 5-6, 8 (petitioner had sought stay of court of appeals' mandate pending his petition for certiorari, and his petition for judicial review of his administrative order of deportation under the INA was pending in the court of appeals, thus automatically staying deportation under 8 U.S.C. 1105a(a)(3) (1994)).

It would not be appropriate to apply the capable-of-repetition-yet-evading-review exception here based on speculation that the Alabama district court's deportation order could become moot in the same manner as in the instant case. That would require petitioner to violate his supervised release conditions—an occurrence that petitioner can avoid, and is compelled by law to avoid. Exemption of a controversy from mootness because it will otherwise continue to evade review is generally justified only when the evasion of review results from circumstances that cannot be avoided. See, *e.g.*, *Honig* v. *Doe*, 484 U.S. 305, 317-323 (1988) (aging); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973) (progression of pregnancy); *Rosario* v. *Rockefeller*, 410 U.S. 752, 756 n.5 (1973) (public elections); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 602-603 (1982) (completion of criminal trials from which press and public are excluded).

Finally, application of the mootness exception for recurring controversies that evade review would be particularly inappropriate in this case, because the prospect of "repetition" of the specific legal controversy raised by petitioner will be eliminated after April 1, 1997, the effective date of Section 304(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (*reproduced at* 138

Cong. Rec. H11,798 (daily ed. Sept. 28, 1996)) (to be codified at 8 U.S.C. 1230(a)(3)). Section 304(a)(3) adds to the INA a new Section 240 that states that,

> [u]nless otherwise specified in [the INA], a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States.

The INA does "otherwise specif[y]" that judicial orders of deportation are authorized in proceedings under the recently enacted, and even more recently amended and renumbered, Section 238(c) of the INA (to be codified at 8 U.S.C. 1228(c)) (see U.S. Br. 33-38). That Section, unlike 18 U.S.C. 3583(d), includes detailed procedures requiring, *inter alia*, a recommendation from the INS regarding the alien's eligibility for relief from deportation. The INA, however, does not "otherwise specif[y]" that the determination of the admission or removal of an alien is authorized in proceedings under Section 3583(d) of Title 18.

Thus, the new provision of IIRAIRA overrides the holding of the court of appeals in this case.[5] It follows that the legal issue presented in this case, *i.e.*, the authority of the sentencing court under Section 3583(d) to enter a judicial order of deportation, will not recur in the same form after April 1987. See Br. of Court-invited Amicus Curiae 23 n.9 (suggesting that, in light of IIRAIRA, controversy presented by instant case may lack any continuing importance, and

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[5] The Court granted certiorari in the instant case on October 1, 1996. IIRAIRA had just been enacted the preceding day and had not been discussed in the parties' briefs at the petition stage, which were filed before that enactment.

dismissal of the writ of certiorari as improvidently granted may be warranted). That circumstance deprives the particular controversy here of prospective likelihood of repetition.[6]

It is, of course, true that judgments entered before IIRAIRA's effective date may present the same legal issue raised by petitioner. Other petitions presenting that issue are in fact pending before this Court. The Court-invited amicus curiae suggests that the Court might be able to avoid the consequences of mootness in this case by granting review in one or more of those cases. Br. of Court-invited Amicus Curiae 6 n.4.[7] The United States is currently preparing responses to the petitions in those cases. The diminishing importance of the controversy in light of IIRAIRA, however, weighs against the Court granting review in those cases simply to preserve the legal issue for review despite the mootness of this case.

b. Challenges to criminal convictions are not moot even after defendants have completed service of their sentences if the conviction carries collateral legal consequences. See *Carafas* v. *LaVallee*, 391 U.S. 234 (1968) (civil and employment disabilities imposed by

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[6] Petitioner will remain in prison, under the Alabama district court's sentence, beyond the April 1, 1997, effective date of Section 304(a)(3) of the IIRAIRA.

[7] See *Oboh* v. *United States*, petition for cert. pending, No. 96-6653; *Bowen* v. *United States*, petition for cert. pending, No. 96-6658. In addition to those two cases, petitions raising the issue have been filed in two more cases. See *Akamiokhor* v. *United States*, petition for cert. pending, No. 96-6898; *Valdez-Mejia* v. *United States*, petition for cert. pending, No. 96-7063. In at least some of those cases, however, the petitioner has already been deported. Those cases thus may be moot as well.

law); *Sibron* v. *New York*, 392 U.S. 40, 57 (1968) (a criminal case is moot "only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction"); *Evitts* v. *Lucey*, 469 U.S. 387, 391 n.4 (1985) (possibility of impeachment and future criminal enhancement); *Minnesota* v. *Dickerson*, 508 U.S. 366, 371 n.2 (1993) (future determination of criminal history).

Challenges to criminal convictions or sentencing orders are, however, rendered moot by completion of the sentence if the particular conviction or order does not carry such collateral consequences. See *Lane* v. *Williams*, 455 U.S. 624 (1982) (dismissing as moot a challenge to a revocation of parole when, before the case could be decided by the Court, the defendants had been released); see also *Broughton* v. *North Carolina*, 717 F.2d 147 (4th Cir. 1983) (challenge to misdemeanor contempt conviction became moot upon expiration of sentence because conviction had no effect on defendants' civil rights and did not present a possibility of enhancement of sentence in future criminal proceeding, and because defendant's continued reputational interests were not sufficient to avoid mootness), cert. denied, 466 U.S. 940 (1984); *Vandenberg* v. *Rodgers*, 801 F.2d 377, 378 (10th Cir. 1986) (per curiam) (challenge to delay in release on parole rendered moot by release on parole because no collateral consequences remained from delay; possibility that defendant may be subjected to future adverse consequences because of underlying incident report was too speculative).

The revoked condition of supervised release that petitioner be deported does not have any continuing collateral legal consequences for petitioner. No civil liabilities result from a revoked deportation condition

of supervised release. Nor does a revoked deportation condition of supervised release have consequences for impeachment, future criminal sentence enhancement, or employment prospects. Petitioner does not challenge the conviction underlying his sentence (or the findings of supervised release violations underlying the revocation order), which might have such consequences. Rather, he challenges only a condition of supervised release that was never executed and that no longer exists. Cf. *North Carolina* v. *Rice*, 404 U.S. 244, 246-248 (1971) ("Nullification of a conviction may have important benefits for a defendant * * * but urging in a habeas corpus proceeding the correction of a sentence already served is another matter.").[8]

Nor does the district court's determination to impose a deportation condition, in the now-revoked term of supervised release, have any collateral legal consequences. The district court's determination, standing alone, would not affect any future criminal or immigration proceeding against petitioner. Petitioner was convicted of violating 8 U.S.C. 1326 (1994), which requires proof that he is an alien who re-entered the United States illegally following a prior

[8] Contrary to the suggestion of an amicus curiae, the order of the district court revoking petitioner's supervised release does not appear to have been based in any respect on petitioner's violation of the deportation condition of supervised release. See Br. of Amicus Curiae WLF 10 n.3. As we explained in our brief, the order itself does not recite the grounds for revocation, but the probation officer's petition for revocation, which serves to notify the defendant of the grounds on which revocation is being sought, cited four grounds, none of which was the fact that petitioner had not been deported. See U.S. Br. 6.

deportation. Moreover, the INS has, since the imposition of the criminal sentence in this case, independently found him to be deportable and ordered his deportation under the provisions of the INA.[9] In the face of those determinations establishing petitioner's status as a deportable alien, there is no basis for any speculation that the unexecuted condition of supervised release requiring deportation of petitioner would have any collateral effect on him in any future proceeding.

* * * * *

In sum, any decision by this Court that invalidated the now-revoked deportation order that was imposed as a condition of supervised release would have no

[9] The immigration judge's order that petitioner be deported under the INA is not based on the supervised-release deportation condition. Rather, the INS order to show cause why petitioner should not be deported was based on a charge under Section 241(a)(1)(A) of the INA, 8 U.S.C. 1251(a)(1)(A) (1994), that, at the time of his entry, he was excludable because he had been previously arrested and deported and had not obtained consent of the Attorney General to reenter as requir ed under Section 212(a)(6)(B)(i) of the INA, 8 U.S.C. 1182(a)(6)(B)(i) (1994). The May 12, 1995, decision and order of the immigration judge cited that order to show cause, found that the INS had established alienage and deportability, and ruled that petitioner had waived any relief from deportation. Similarly, the June 5, 1995, warrant of deportation cites Section 241(a)(1)(A) as the basis for petitioner's deportation. Finally, the February 1, 1996, order of the immigration judge denying petitioner's motion to reopen proceedings simply rejected petitioner's claims of insufficient notice and asylum.

effect on the judgment in this case. Because the condition of supervised release that petitioner challenges has been revoked, the case is now moot and should be dismissed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

DECEMBER 1996

Supreme Court, U.S.
FILED
JAN 9 1997
CLERK

No. 95-8736

In the Supreme Court of the United States

OCTOBER TERM, 1996

LARRY OSA OGBOMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF UNITED STATES IN SUPPORT OF SUGGESTION OF MOOTNESS

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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EDITOR'S NOTE

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1. a. Petitioner contends (Pet. Response 6-11) that the case is not moot because he continues to be subject to adverse collateral consequences flowing from the "judicial order of deportation." First, he suggests (at 6-7) that the Immigration and Naturalization Service (INS) order of deportation that was entered against him may have been based on consideration of the order imposing deportation as a condition of supervised release in this case. That is incorrect.

The administrative order of deportation pending against petitioner was not based on the order imposing deportation as a condition of supervised release in this case. The INS order to show cause, the warrant

of deportation, and the orders of the immigration judge show that petitioner was found to be deportable under then-current Section 241(a)(1)(A) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(1)(A). That Section applied to petitioner because he was excludable at the time of entry based on the fact that he had been previously arrested and deported and reentered the United States without the consent of the Attorney General as required under then-current Section 212(a)(6)(B)(i), 8 U.S.C. 1182(a)(6)(B)(i). See U.S. Lodging 1a-12a. In addition, review of the tape-recorded immigration proceedings confirms that the judicial deportation order was not the basis for the finding of deportability or the administrative deportation order.[1]

Second, petitioner asserts (Pet. Response 7) that his INS deportation order was based on his conviction for reentry after deportation, in violation of 8 U.S.C.

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[1] We provided counsel for petitioner with a copy of the tape-recorded immigration proceedings on December 23, 1996. That tape-recording reveals that, although neither petitioner nor his immigration counsel was present at the final deportation hearing on May 12, 1996, that hearing was merely a continuation of deportation proceedings that had been initiated against petitioner in Oakdale, Louisiana, where he had been incarcerated. By the time of the May 12 hearing, an immigration judge already had found, at a January 4, 1995, hearing, by clear, convincing and unequivocal evidence, that petitioner was deportable under the INA based on his reentry, without consent of the Attorney General, after deportation. Petitioner's immigration counsel participated in that January 4 hearing and waived petitioner's presence. The only remaining issue was whether petitioner could obtain relief from deportation. Petitioner waived any claim to such relief by failing to appear at the May 12 hearing despite the fact that proper notice had been provided his immigration counsel of record.

1326, and that the earlier deportation also was based on a judicial order under 18 U.S.C. 3583(d). Thus, he reasons that the INS order would be undermined if he prevails in this Court.

Petitioner's earlier deportation was not based on a judicial order of deportation under Section 3583(d). The September 5, 1991, judgment in that case (App., *infra*, 1a-5a) provides that petitioner was to depart the United States and that he would be in violation of the sentence if he were found in the United States after four days. *Id.* at 5a. Petitioner was ultimately deported by the INS on November 20, 1991, based on a March 25, 1991, order of an immigration judge. See *Id.* at 6-7a, 8a. That administrative order, the underlying February 19, 1991, order to show cause, and the deportation warrant all indicate that petitioner's deportation was effected pursuant to the immigration judge's order that he be deported under then-current Section 241(a)(4) of the INA because he had been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal conduct. See App., *infra*, 6a-11a.

In any event, petitioner's argument is premised on the assertion that he is continuing to challenge his administrative deportation order (see Pet. Response 7), and that he could use a favorable ruling in this case to his advantage in the administrative proceedings. To the contrary, petitioner never challenged the administrative order on grounds related to his judicial deportation order. When petitioner sought reopening of the administrative deportation proceedings, the only grounds he cited were the lack of proper notice and an unsubstantiated asylum claim, both of which the immigration judge found inadequate to support reopening. See U.S. Lodging 12a. And,

petitioner has not sought any further review before the Board of Immigration Appeals of his administrative deportation order or the denial of his motion to reopen. Thus, the administrative order is final. See *Stone* v. *INS*, 115 S. Ct. 1537, 1542 (1995).[2]

b. Petitioner also notes (Pet. Response 8-11) that collateral consequences could flow from an *executed* order of deportation. For example, he asserts that a prior deportation may be used in a subsequent criminal history calculation or might be used in subsequent immigration proceedings to preclude a finding of good moral character or as a basis for denial of discretionary relief.

Those collateral consequences, however, have no application to petitioner because his deportation order was never executed. Petitioner was not deported

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[2] Amicus curiae recognizes (Amicus Response 10-14) that the final administrative order of deportation pending against petitioner "may well deprive petitioner of any 'legally cognizable interest in the outcome' " of the case, thereby rendering it moot. *Id.* at 10 (quoting in part *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 396 (1980)). Amicus suggests (Amicus Response 10-11), however, that the administrative order may not render the case non-justiciable because duplicative administrative orders of deportation are likely to render moot other cases involving other criminal aliens raising the same issue. Amicus proposes that the "capable of repetition, yet evading review" doctrine could therefore be applied here, in spite of the fact that the other cases would involve different parties. As we noted in our suggestion of mootness, however, after the April 1, 1997, effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009 (*reproduced at* 138 Cong. Rec. H11,798 (daily ed. Sept. 28, 1996)) (to be codified at 8 U.S.C. 1230(a)(3)), cases raising the same issue will no longer arise—Section 304(a)(3) of IIRAIRA overrides the holding of the court of appeals in this case.

pursuant to the judicial deportation condition of his supervised release. And there is no possibility that petitioner will be deported in the future under that order because his supervised release was revoked and no longer exists. See Suggestion of Mootness 3-4. Petitioner provides no legal support for his suggestion (Pet. Response 2-3) that an order of deportation that is imposed under a statute that authorizes conditions of supervised release could survive after the revocation of the supervised release.

2. Amicus asserts (Amicus Response 3-4) that the order against petitioner in the Alabama district court case, that he be deported as a condition of supervised release in that case, means that the instant case is justiciable because petitioner is reasonably likely to be subjected to the same official action again.

As amicus acknowledges, the Court "generally [has] been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." Amicus Response 3 (quoting *Honig* v. *Doe*, 484 U.S. 305, 320 (1988)). That petitioner already had engaged in the unlawful additional misconduct at the time of the supervised release revocation in the instant case does not alter the fact that the instant case should not be saved from mootness as a consequence of petitioner's unlawful conduct. Cf. *Lane* v. *Williams*, 455 U.S. 624, 633 n.13 (1982).

Amicus contends (Amicus Response 3-10) that, despite the fact that petitioner did not appeal from the judicial order of deportation in the Alabama district court case, the "capable of repetition, yet evading review" exception to the mootness doctrine could apply here. He indicates that, even though petitioner's Alabama case, in fact, evaded appellate review because

petitioner did not appeal, the case might have evaded review even if petitioner had appealed because he may not have been able to obtain review by this Court before being deported. See *id.* at 7-8. Amicus acknowledges that a stay would have resolved that problem, however.

The simple fact is that a ruling in this case would have no direct consequence for petitioner's Alabama sentence because he did not appeal it. Moreover, any collateral relief that petitioner might seek would not only have to overcome a cause and prejudice standard (see Amicus Response 11-12 n.5), but would also have to overcome the fact that petitioner consented to the deportation condition as part of his guilty plea.

For the foregoing reasons and those set forth in our suggestion of mootness, the case is now moot and should be dismissed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JANUARY 1997

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By: D. Park Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number:
1:91-cr-120-01-JOF

vs.

Michael Maloof
Deft.'s Attorney

LARRY OSA OGBOMON

The defendant pleaded guilty to counts one and three.

Accordingly, the defendant is adjudged guilty of such counts, which involve the following offenses:

Title & Section	Nature of Offense	Count Numbers
18:1344	Bank Fraud	one and three

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform of 1984.

IT IS ORDERED that the defendant shall pay to the United States a special assessment of $100.00, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

ATTEST: A TRUE COPY
CERTIFIED THIS
OCT 3 1991
Luther D. Thomas, Clerk
By: Deputy Clerk

AO 72A
Rev. 8/82)

Defendant's Soc. Sec. No.
253-57-0163

Defendant's mailing address
Federal Penitentiary
Atlanta, Georgia

August 30, 1991
Date of Imposition of Sentence

J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

Defendant's residence address
Federal Penitentiary
Atlanta, Georgia

9/5/91
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FOURTEEN (14) MONTHS.

Defendant: LARRY OSA OGBOMON
Case Number: 1:91-cr-120-01-JOF

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state, or local crime;

2) The defendant shall not leave the judicial district without the permission of the court or probation officer;

3) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) The defendant shall support his or her dependents and meet other family responsibilities;

6) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) The defendant shall notify the probation officer within seventy-two hours of any change of residence or employment;

8) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

Defendant: WILLIAM ARTHUR HIXSON
Case Number: 1:91-cr-43-02-JOF

12) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without permission of the court;

14) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

Defendant: LARRY OSA OGBOMON
Case Number: 1:91-cr-120-01-JOF

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS, with the SPECIAL CONDITION that the defendant depart the United States. If the defendant is found in the United States more four days, it will be deemed that he violated the sentence.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release.

UNITED STATES OF AMER
DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

WARRANT OF DEPORTATION

No. A28 682 629

To any Officer or Employee of the United States Immigration and Naturalization Service.

After due hearing before an authorized officer of the United States Immigration and Naturalization Service, and upon the basis thereof, an order has been duly made that the alien Larry Osa OGBOMON

who entered the United States at New York, New York

on or about the 4th day of April, 1987, is subject to deportation under the following provisions of the laws of the United States, to wit:

Section 241(a)(4) of the Immigration and Nationality Act.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, command you to take into custody and deport the said alien pursuant to law, at the expense of the Transportation company which brought him to the United States, if practical; otherwise at the expense of the appropriations, "Salaries and expenses, Immigration and Naturalization Service, 19 " including the expense of an attendant, if necessary.

Signature: John B.Z. Caplinger (SIG)

Title: John B. Z. Caplinger, District Director

Date: March 27, 1991

Place: Oakdale, Louisiana

Form I-205
(Rev.11-29-79)N

WARRANT FOR DEPORTATION OF

Larry Osa OGBOMON A28 682 629
(Name of Deportee)

Deported at Port of NYC (port of departure from the U.S.) on 11-20-91 (date of departure)

via TWA-1 904
(manner of departure; identify airline or ship; if other, state: afoot, car, etc.)

Departure witnessed by: Jacqueline Ostertag
(signature and title of officer)

If actual departure not witnessed, fully identify source or means of departure verification:

If self-deportation pursuant to 8CFR 243.5, check here ☐

Officer Executing Warrant: Jacqueline Ostertag
(signature and title)

Date Form Completed: 11-30-91

Comments:

(signature of person fingerprinted)

(signature of official taking print)

right thumb print

(title of official taking print)

U.S. Department of Justi
Exe..tive Office for Immigratic. Review
Office of the Immigration Judge

File A 28 - 682 - 629

n the Matter of OGBOMON, LARRY OSA

In Deportation Proceedings

Respondent

Order of the
Immigration Judge

Upon the basis of respondent's admissions, I have determined that he is eportable on the charge(s) stated in the Order to Show Cause.

Respondent has made no application for relief from deportation.

ORDER: It is ordered that respondent be deported from the United States to IGERIA on the charge(s) contained in the Order to Show Cause.

Copy of this decision has been served upon respondent and the Immigration and Naturalization Service.
Appeal: Waived

Date: 03 / 25 / 91
Place: ALIEN DETENTION CENTER
Record File Copy
Alien's Copy
INS Copy

Charles A. Wiegand

CHARLES A. WIEGAND, III
Immigration Judge

Form EOIR-7
CHG

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service No.

ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. A28 682 629

In the Matter of Larry Osa OGBOMON aka: Terry ZOOK; Donald RIGHT Respondent.
C/O:United States Immigration & Naturalization Service
77 Forsyth Street, Atlanta, GEorgia 30303
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Nigeria and a citizen of Nigeria;
3. You entered the United States at New York, New York on or about April 4, 1987;
(date)

"SEE CONTINUATION SHEET ATTACHED HERETO AND MADE A PART HEREOF"

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

"SEE CONTINUATION SHEET ATTACHED HERETO AND MADE A PART HEREOF"

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at a place, date and time to be set.
on XXXXXXXXXXXXXXXXXXXXXXXX at XXXXXXXXXXXXX m, and show cause why you should not be deported from the United States on the charge(s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated: February 19, 1991

NEIL JACOBS, Assistant District Director for
(signature and title of issuing officer) Investigations
Atlanta, Georgia
(City and State)

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS, THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witness considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charge set forth therein. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

NOTICE OF CUSTODY DETERMINATION

Pursuant to the authority of Part 242.2, Title 8, Code of Federal Regulations, the authorized officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, or from the date of the final order of the court, if judicial review is had, you shall be:

☒ Detained in the custody of this Service. ☐ Released on recognizance.

OR

☒ Released under bond in the amount of $ 25,000.00.

You may request the Immigration Judge to redetermine this decision.

☐ I do ☒ I do not request a redetermination by an Immigration Judge of the custody decision.

(signature of respondent) FEB 19TH 1991 (date)

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

(signature of respondent) FEB 19TH 1991 (date)

CERTIFICATE OF SERVICE

Served by me at Atlanta, Georgia on February 19, 1991 at 3:30 pm.
by personal service. I-618 served.
Right thumb

Jon Daniel Special Agent
(signature and title of employee or officer)

CONTINUATION SHEET

Name: Larry Osa OGBOMON Date: February 19,1991
Aka: Terry ZOOK; Donald RIGHT File No: A28 682 629

4. You were then admitted as a nonimmigrant visitor for pleasure;

5. On September 28, 1988 your status was adjusted to that of a conditional resident alien;

6. You were on February 14, 1991 convicted in the Superior Court of Dekalb County, Georgia of six counts of bad checks in violation of Georgia Statute 16-9-20;

7. You were on February 14, 1991 convicted in the Superior Court of Dekalb County, Georgia of three counts of forgery in the first degree in violation of Georgia Statute 16-9-1;

8. You were on February 14, 1991 convicted in the Superior Court of Dekalb County, Georgia of one count of theft by taking in violation of Georgia Statute 16-8-2;

9. You were on February 14, 1991 convicted in the Superior Court of Dekalb County, Georgia of one count of giving a false name to a law enforcement officer in violation of Georgia Statute 16-10-25;

10. You were on February 14, 1991 convicted in the Superior Court of Dekalb County, Georgia of eight counts of use of false name in the application for driver's license in violation of Georgia Statute 16-10-25.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(4) of the Immigration and Nationality Act, in that, you at any time after entry have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, to wit, six counts of bad checks, three counts of forgery in the first degree, one count of theft by taking, one count of giving a false name to a law enforcement officer and eight counts of use of a false name in the application for driver's license.

(10)

No. 95-8736

Supreme Court, U.S.
FILED
JAN 10 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LARRY OSA OGBOMON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONSE OF *AMICUS CURIAE* TO THE SUGGESTION OF MOOTNESS

THOMAS G. HUNGAR
Amicus Curiae, invited by the Court per Order of October 7, 1996

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-8736

LARRY OSA OGBOMON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONSE OF *AMICUS CURIAE* TO THE SUGGESTION OF MOOTNESS

Pursuant to this Court's order of December 24, 1996, *amicus curiae* respectfully submits this response to the suggestion of mootness filed by the Acting Solicitor General.

INTRODUCTION

This case presents the question whether the district court possessed statutory authority under 18 U.S.C. § 3583(d) to require petitioner's deportation as a condition of supervised release. The term of supervised release to which petitioner was sentenced in this case was revoked by the district court on April 10, 1996. U.S. Br. 6; Suggestion of Mootness ("Suggestion") at 2; Order Revoking Supervised Release—Judgment and Commitment at 1 (N.D. Ga. Apr. 10, 1996). Meanwhile, in

August 1996, petitioner was sentenced by a different district court in a separate proceeding to 24 months' imprisonment, to be followed by five years' supervised release, with the condition that petitioner " 'shall be deported immediately upon completion of the term of imprisonment and shall remain outside the United States during the period of supervised release, in accordance with 18 U.S.C. § 3583(d) and with *U.S. v. Chukwura.*' " U.S. Br. 7 n.5; *United States* v. *Ogbomon*, No. CR 96-PT-124-NE, Judgment in a Criminal Case ("Alabama Judgment") at 3 (N.D. Ala. Aug. 29, 1996).

ARGUMENT

"Under Article III of the Constitution this Court may only adjudicate actual, ongoing controversies." *Honig* v. *Doe*, 484 U.S. 305, 317 (1988); *see also Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964) (mootness doctrine derives from Article III's "case or controversy" requirement). An actual controversy must exist at all stages of appellate review. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 389 (1994). As this Court has recognized, however, "Art. III justiciability is 'not a legal concept with a fixed content or susceptible of scientific verification.' " *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 400-401 (1980). Rather, " '[t]he justiciability doctrine [is] one of uncertain and shifting contours.' " *Id.* at 401.

This case amply illustrates the uncertainty referred to in *Geraghty*. On the one hand, in view of the district court's revocation of petitioner's term of supervised release and accompanying deportation condition, there is considerable merit to the suggestion that the case should be dismissed as moot. On the other hand, the district court's revocation order does not necessarily render this case moot in the constitutional sense. At the time the district court issued its revocation order, petitioner was likely to be (and now has been) subjected to the same

official action at issue in this case (namely, imposition of a judicial order of deportation pursuant to 18 U.S.C. § 3583(d)). Moreover, it is theoretically possible that a ruling on the merits in petitioner's favor could provide him with some meaningful relief. Accordingly, the Court may possess authority to decide this case on the merits. Even if the case is justiciable, however, prudential considerations militate in favor of dismissal.

I. The District Court's Revocation Of The Term Of Supervised Release And Accompanying Deportation Requirement Did Not Render The Case Non-Justiciable

A. Petitioner Was Reasonably Likely To Be Subjected To The Same Official Action Again

This Court has held that the discontinuance of challenged government action will not necessarily render a challenge to that action moot if there is a sufficiently substantial likelihood that the challenged action will be repeated. *See Washington* v. *Harper*, 494 U.S. 210, 219 (1990) (case not moot where "there is a strong likelihood" that the challenged governmental conduct might recur); *Vitek* v. *Jones*, 445 U.S. 480, 487 (1980) (case not moot because "it is not 'absolutely clear . . . that the allegedly wrongful behavior could not reasonably be expected to recur' "); *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979); *see generally* 13A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3533.7 (2d ed. 1984 & Supp. 1996). Moreover, "[t]he burden of demonstrating mootness 'is a heavy one.' " *County of Los Angeles* v. *Davis*, 440 U.S. at 631.

After the district court revoked petitioner's term of supervised release in this case, there was a "strong likelihood" that petitioner would again be placed on supervised release and ordered deported pursuant to 18 U.S.C. § 3583(d). To be sure, this Court "generally [has] been unwilling to assume that the party seeking relief will

repeat the type of misconduct that would once again place him or her at risk of that injury." *Honig* v. *Doe*, 484 U.S. 305, 320 (1988). At the time petitioner's term of supervised release was revoked, however, he had already been arrested pursuant to a criminal complaint filed in the United States District Court for the Northern District of Alabama charging him with bank fraud. U.S. Br. 6, 7 n.5. Accordingly, the likelihood that petitioner would again be sentenced to prison and a term of supervised release was far greater than would normally be the case.[1] And as an alien defendant subject to deportation, there was also a "strong likelihood" that, in keeping with what appears to be common practice in the district courts in the Eleventh Circuit, he again would be ordered deported as a condition of his supervised release.

Ultimately, the United States District Court for the Northern District of Alabama did order petitioner deported as a condition of supervised release pursuant to 18 U.S.C. § 3583(d). Alabama Judgment at 3. If a "strong likelihood" of a recurrence is sufficient to satisfy the justiciability requirements of Article III, *a fortiorari* an *actual* recurrence should suffice to preserve this Court's jurisdiction to decide the question presented. Accordingly, the fact that the term of supervised release and accompanying deportation condition imposed in this case have been revoked does not compel dismissal of the case as moot.

---

[1] Indeed, petitioner ultimately pleaded guilty in the Northern District of Alabama to eight counts of bank fraud (18 U.S.C. § 1344(2)), two counts of a scheme to defraud (18 U.S.C. § 2314)), and one count of misusing a social security number (42 U.S.C. § 408(a)(7)(B)). Alabama Judgment at 1. In accordance with the applicable Sentencing Guidelines range, his term of imprisonment exceeded 12 months (*id.* at 2, 4), and a term of supervised release was therefore mandatory. U.S.S.G. § 5D1.1.

B. This Case May Be Capable Of Repetition Yet Evading Review

The Acting Solicitor General contends (Suggestion 5-10) that this case does not satisfy the mootness exception for cases that are "capable of repetition, yet evading review." *See, e.g., Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam); *see generally* 13A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3533.8 (2d ed. 1984 & Supp. 1996). Even if correct, that contention would not undermine the justiciability of this case under the analysis discussed in Part I.A above. In any event, however, this case may also satisfy the "capable of repetition, yet evading review" exception.

1. "Capable Of Repetition"

For reasons already set forth above, the issue presented in this case is clearly "capable of repetition" with respect to petitioner; indeed, it already has reoccurred by virtue of petitioner's conviction and sentence in the Northern District of Alabama. The Acting Solicitor General asserts, however, that "[t]he legal issues raised by the Alabama judgment are not identical to the legal issues raised [by the Georgia judgment]" because, at the time the district court in Alabama entered judgment, petitioner was subject to an outstanding administrative deportation order. Suggestion at 6. The proffered distinction is unpersuasive.

The question presented in this case is precisely the same as that raised by the Alabama judgment, namely, whether 18 U.S.C. § 3583(d) authorizes federal district courts to require that alien defendants be deported. There is no merit to the suggestion that "[a]n order of judicial deportation under Section 3583(d) entered *after* a final administrative order of deportation raises different legal issues from those raised by the instant case." Suggestion at 6. Either Section 3583(d) authorizes judicial orders of deportation or it does not; neither petitioner

nor the Government has put forward an interpretation of Section 3583(d) that would authorize judicial orders of deportation only in circumstances where the defendant has already been subjected to an administrative order of deportation.[2] In any event, the language of Section 3583(d) cannot support such a construction.

There is no evidence that the Alabama district court relied in any way on the INS's determination that petitioner was a deportable alien. Indeed, irrespective of the administrative deportation order, it is indisputable that petitioner *is* an alien who is subject to deportation. Br. of *Amicus Curiae* 15 n.7. And in any event, a case may be "capable of repetition" even absent a showing that the legal issue likely will recur in precisely the same factual setting (*cf. Carroll* v. *Princess Anne*, 393 U.S. 175, 178-179 (1968)), or that precisely the same challenged action will recur (*see Burlington Northern R.R. Co.* v. *Surface Transp. Bd.*, 75 F.3d 685, 688-689 (D.C. Cir. 1996)).[3] Accordingly, this case clearly satisfies the "capable of repetition" requirement.

---

[2] Indeed, the Government has disavowed any such interpretation, asserting instead that Section 3583(d) merely authorizes the district court "to provide, as a condition of supervised release, that an alien defendant who is subject to deportation, *i.e.*, an alien who has been or will be ordered deported by the Attorney General under the INA, 'be surrendered to immigration officials for deportation proceedings under the [INA] . . . for the purpose of determining whether he is "an alien defendant . . . subject to deportation" ' and for such deportation." U.S. Br. 30 (citation omitted).

[3] *Murphy* v. *Hunt*, 455 U.S. 478 (1982) (*see* Suggestion at 6-7), is beside the point. In that case, the only constitutional claim raised by the criminal defendant was a challenge to the denial of pretrial bail; his subsequent conviction rendered that claim moot. The possibility that the defendant might later assert a separate claim for bail pending appeal was not sufficient to preserve the case from mootness because the constitutionality of denying bail to a person awaiting trial is obviously "a question distinct from the constitutionality of [denying bail] . . . to a person who has been tried and convicted." 455 U.S. at 481 n.5.

2. "Evading Review"

A more difficult question is presented by the "evading review" portion of this exception to the mootness doctrine. To be sure, petitioner's apparent failure to file a notice of appeal from his Alabama sentence (Suggestion at 7 n.3) will preclude further review (absent a motion to vacate sentence under 28 U.S.C. § 2255), but that omission obviously does not demonstrate that "the challenged action was in its duration too short to be fully litigated prior to its cessation." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam).

On the other hand, even if petitioner had filed a timely notice of appeal and sought to challenge the Alabama district court's order of deportation, it is far from clear that he would have been able to obtain review in this Court before being deported pursuant to the judgment in that case.[4] Judgment was entered in the Alabama action on August 29, 1996. Petitioner was sentenced to 24 months in prison, but because his sentence is concurrent with his earlier revocation sentence in the Georgia action (Alabama Judgment at 2), and accounting for credit for time served, he is likely to be released early in 1998. According to the Alabama judgment, petitioner "shall be deported immediately upon completion of the term of imprisonment." Alabama Judgment at 3. It follows, therefore, that petitioner likely will be deported considerably less than 24 months from the date judgment was entered in the Alabama action.

This Court has indicated that orders of less than two years' duration ordinarily evade review. *Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 514-516 (1911); *see also Wisconsin Dep't of Industry* v. *Gould Inc.*, 475 U.S. 282, 285 n.3 (1986) (applying "capable of repeti-

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[4] By the same token, even if petitioner were to file a motion under 28 U.S.C. § 2255 seeking to challenge the deportation portion of his sentence in the Alabama case, it is unlikely that he could obtain full review prior to being deported.

tion, yet evading review" exception to permit review of three-year debarment that expired prior to decision). Thus, the relatively short duration of petitioner's imprisonment suggests that this case may well be one that satisfies the "evading review" prong of the "capable of repetition, yet evading review" doctrine. Indeed, more than 32 months have passed since petitioner initially was sentenced in this case, and this Court has not yet had an opportunity to decide the merits.

The Acting Solicitor General notes, however, that "[i]f a defendant (such as petitioner) anticipates that he will complete his term of imprisonment and then face deportation under a term of supervised release before completion of the entire appellate process (including any review by this Court), the defendant may seek to protect his ability to obtain relief by requesting a stay of the judicial deportation order." Suggestion at 7-8. Plainly, the possibility that petitioner might have been able to obtain a stay and thereby preserve his ability to receive full appellate review of the Alabama sentence militates against application of the "capable of repetition, yet evading review" exception in this case. That possibility is not necessarily fatal, however; the Court has at times deemed the exception applicable even in circumstances where it would seem that a stay, if sought and granted, could have preserved a live controversy pending appellate review. *See, e.g., Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 602-603 (1982); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546-547 (1976); *Super Tire Eng'g Co.* v. *McCorkle*, 416 U.S. 115, 125-127 (1974).

Moreover, a strong likelihood that a challenged action will recur, standing alone, is sufficient to satisfy Article III's "controversy" requirement. *See, e.g., Harper*, 494 U.S. at 219 (focusing solely on likelihood of recurrence); *Vitek*, 445 U.S. at 487 (same); *County of Los Angeles* v. *Davis*, 440 U.S. at 631 (same); *United States* v. *Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968) (same); *United States* v. *W. T. Grant Co.*,

345 U.S. 629, 633 (1953) (same). For purposes of Article III justiciability, therefore, the question whether the issue is likely to evade review in a future case does not appear to be dispositive. "[T]he 'yet evading review' portion of [this Court's] 'capable of repetition, yet evading review' test is prudential; whether or not that criterion is met, a justiciable controversy exists." *Honig* v. *Doe*, 484 U.S. at 341 (Scalia, J., dissenting). Accordingly, the district court's revocation of the sentence imposed in this proceeding does not render the case non-justiciable.

II. The Pendency Of The Administrative Order Of Deportation Against Petitioner Does Not Necessarily Render The Case Moot

The analysis set forth in Part I above suggests that, if the Alabama district court's judgment were the only deportation order pending against petitioner, this case would present a justiciable controversy despite the district court's revocation of the term of supervised release and deportation condition. Obviously, however, the matter is further complicated by the fact that petitioner is also subject to an administrative order of deportation that has apparently become final. U.S. Br. 6 n.4; Suggestion at 7 n.4.

It is well established that a case is moot if it is "impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992). The pending administrative deportation order may well deprive petitioner of any "'legally cognizable interest in the outcome'" (*United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 396 (1980)), thereby rendering the case moot. On the other hand, there are at least two possible bases for concluding that the administrative order does not render the case non-justiciable.

First, as long as the Executive Branch continues to take the position that district courts lack authority to issue orders of deportation under 18 U.S.C. § 3583(d), the

potential mootness problem created by duplicative administrative orders of deportation is likely to occur in most, if not all, cases arising under Section 3583(d). That fact may suggest that a form of the "capable of repetition, yet evading review" doctrine should be applied to avoid depriving this Court of its ultimate authority to decide the meaning of Section 3583(d). *Cf. Honig* v. *Doe*, 484 U.S. at 335-36 (Scalia, J., dissenting) (noting that the Court has sometimes "dispens[ed] with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur between the defendant and other members of the public at large without ever reaching us") (emphasis eliminated); *Rosario* v. *Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Doe* v. *Bolton*, 410 U.S. 179, 187 (1973); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330, 333 n.2 (1972).

Second, there is a theoretical (albeit highly attenuated) possibility that petitioner could obtain some meaningful relief from a ruling in his favor in this case. If this Court were to hold that federal district courts lack jurisdiction to impose deportation as a condition of supervised release, it would follow that the Alabama district court lacked jurisdiction to impose that condition on petitioner. Accordingly, petitioner could move to correct his sentence pursuant to 28 U.S.C. § 2255.[5] The question to be decided

[5] Petitioner presumably would have to satisfy the "cause and prejudice" standard to sustain a collateral attack on his sentence. *See United States* v. *Frady*, 456 U.S. 152, 167-168 (1982). It is well established that ineffective assistance of counsel constitutes "cause" for failing to raise an issue on direct review. *United States* v. *Breckenridge*, 93 F.3d 132, 134 n.1 (4th Cir. 1996). Thus, petitioner could prevail in a collateral challenge by showing that defense counsel in the Alabama action rendered ineffective assistance by failing to seek appellate review of the deportation order. Given the existing circuit conflict, the Solicitor General's confession of error on the Section 3583(d) issue, and the pendency of petitioner's petition for a writ of certiorari seeking this Court's review of that issue, it is at least conceivable that petitioner would be able to make this showing.

in this case—whether Section 3583(d) authorizes a federal district court to order an alien defendant deported as a condition of his supervised release—thus may "affect the rights" of petitioner. *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) (per curiam).

The possibility of "effectual relief" is not necessarily eliminated by the outstanding administrative deportation order. It appears that there could conceivably be independent consequences attributable to the supervised release order entered by the district court in the Alabama action. For example, the order provides that petitioner "shall be deported . . . and shall remain outside the United States during the [60-month] period of supervised release." Alabama Judgment at 3. In the unlikely eventuality that the Attorney General were to authorize petitioner to reenter the United States within five years after his release from prison, *see* 8 U.S.C. § 1182(a)(6)(B)(i), petitioner could not reenter the country without concomitantly violating the deportation condition of his supervised release and thereby subjecting himself to potential incarceration at the discretion of the district court. 18 U.S.C. § 3583(e)(3).[6]

In analogous circumstances, this Court has recognized that the mere possibility of collateral consequences arising from a criminal conviction or sentence will preserve a

[6] In particular, if petitioner (after his deportation) were to qualify as a "refugee" based on a well-founded fear of persecution, *see* 8 U.S.C. § 1101(42), the Attorney General might have discretion to authorize his reentry notwithstanding his earlier removal and criminal history, depending on whether any of petitioner's prior offenses constitutes an "aggravated felony." *See* 8 U.S.C. §§ 1101(a)(43)(M) (aggravated fraud felonies), 1157 (refugees), 1158 (asylum); *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, §§ 321(a)(7) & 604, 110 Stat. 3009 (1996) (revising 8 U.S.C. §§ 1101(a)(43)(M) & 1158), *reproduced at* 138 Cong. Rec. H11808, H11825 (daily ed. Sept. 28, 1996). The Attorney General, however, has no authority to override a federal district court's supervised release order.

case from mootness despite the expiration or completion of the sentence. *See, e.g., Evitts* v. *Lucey*, 469 U.S. 387, 391 n.4 (1985) ("possibility" of collateral consequences suffices to avoid mootness); *Sibron* v. *New York*, 392 U.S. 40, 55 (1968) ("The mere 'possibility' [of adverse collateral legal consequences] . . . is enough to preserve a criminal case from ending 'ignominiously in the limbo of mootness.' "); *see also North Carolina* v. *Rice*, 404 U.S. at 248 (remanding for determination whether "there may be benefits to" modification of already-served sentence that would preserve case from mootness). Indeed, the Court has applied this principle to permit review of an expired sentence without requiring any showing of precisely what consequences, if any, could potentially result if the sentence went uncorrected. *Pollard* v. *United States*, 352 U.S. 354, 358 (1957) ("The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits.").

To be sure, the foregoing cases involved situations in which the conviction or sentence actually under review could theoretically have collateral consequences; here, by contrast, the collateral consequences are attributable to a judgment entered in a different case. But the principle enunciated in those cases seems applicable here as well, because it demonstrates that petitioner may retain a judicially cognizable interest in challenging the order of deportation imposed by the Alabama district court. If that is so, this case arguably satisfies all of the requirements for justiciability; the revocation of the deportation requirement imposed by the court below does not moot the case because the same requirement was likely to be reimposed in a later case, and the imposition of the administrative order of deportation does not moot the case because the extant judicial deportation order may conceivably have collateral consequences.

III. Even Though This Case May Be Justiciable Under Article III, Prudential Considerations Militate In Favor Of Dismissal

Even if the foregoing analysis is correct, it is obvious that this case lies at or near the outer boundaries of Article III justiciability. Particularly in view of petitioner's apparent unwillingness to take readily available steps to preserve a live controversy (such as his refusal to comply with the law while on supervised release, his failure to file an appeal from the Alabama sentence, and his failure to seek administrative or judicial review of the administrative deportation order), it is difficult to justify the additional expenditure of this Court's resources that would be required to decide this case on the merits. Accordingly, it would be an appropriate exercise of discretion to dismiss the case, either on the ground that the case is moot or because the petition for a writ of certiorari would not have been granted had the Court been informed in a timely manner of the revocation of petitioner's supervised release. *Cf. Tiverton Bd. of License Comm'rs* v. *Pastore*, 469 U.S. 238, 240 (1985) (*per curiam*) (reaffirming the " 'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation").[7]

As previously noted, moreover (*see* Br. of *Amicus Curiae* at 19 n.9), a recently enacted revision of the INA's deportation procedures raises a question about the ongoing significance of the question presented in this case. That provision states that "[u]nless otherwise specified in this Act [the INA], a proceeding under this section [new INA Section 240] shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted,

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[7] Of course, petitioner is not the only person who would be affected by this Court's resolution of the question presented in this case, so there are countervailing reasons for proceeding to address the merits if the case is justiciable.

removed from the United States." IIRAIRA, Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009 (1996), *reproduced* at 138 Cong. Rec. H11798 (daily ed. Sept. 28, 1996), to be codified at 8 U.S.C. § 1230(a)(3) (effective April 1, 1997).

The Acting Solicitor General now takes the position that this provision "overrides the holding of the court of appeals in this case" as to cases arising after April 1, 1997. Suggestion at 9.[8] It remains to be seen, however, whether the Eleventh Circuit will agree with that interpretation; the principle that implied repeals are disfavored certainly suggests that Section 3583(d) will continue to authorize judicial deportation even after IRRAIRA's effective date. *See* Br. of *Amicus Curiae* at 19 n.9.

On its face, moreover, IIRAIRA § 304(a)(3) mandates exclusivity only as to the procedures for removal of aliens who have been "so admitted," *i.e.*, admitted under

[8] The Acting Solicitor General also contends that the enactment of this provision renders inapplicable the mootness exception for controversies that are "capable of repetition, yet evading review." Suggestion at 8-10. But the relevant question for purposes of this mootness exception (at least as it applies to the revocation of supervised release in this case) is whether the controversy between *petitioner* and the United States is "capable of repetition, yet evading review," not whether similar controversies involving *other* defendants are likely to arise with frequency in the future. *Weinstein* v. *Bradford*, 423 U.S. at 149. When petitioner's supervised release and accompanying deportation condition were revoked in this case, and at all times thereafter, there was a reasonable probability that he would again be subjected to the same judicial order; that fact suffices to demonstrate that the controversy is "capable of repetition." "[H]owever much the new [law] may reduce the practical importance of this case, it does not completely remove the controversy." *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203. And in any event, the frequency with which this issue arises in the Eleventh Circuit suggests that it is likely to arise again with respect to other defendants in the future, at least until April 1, 1997 (and quite possibly thereafter as well).

IIRAIRA's amended admissions provision; at least arguably, therefore, Section 304(a)(3) does not affect other statutes to the extent they authorize deportation of aliens who were not admitted under IIRAIRA. But for present purposes, the possibility that the Eleventh Circuit may adopt the Government's reading of this provision and thereby eliminate the present circuit conflict tends to reduce still further the justification for additional expenditure of this Court's resources on this case.[9]

IV. If The Case Is Determined To Be Moot, The Order Granting Certiorari Should Be Vacated And The Petition For Certiorari Should Be Dismissed Without Vacatur Of The Judgment Below

When a criminal case is rendered moot by the death of the defendant, this Court will vacate the order granting certiorari (if appropriate) and dismiss the petition for certiorari. *United States* v. *Green*, 507 U.S. 545 (1993); *Dove* v. *United States*, 423 U.S. 325 (1976); *see also Mintzes* v. *Buchanon*, 471 U.S. 154 (1985). By analogy, the same approach would appear to be appropriate in this case if the Court concludes that the case is moot.

In civil cases that become moot as a result of happenstance while awaiting appellate review, this Court has held that the judgment of the lower court should be vacated and the case dismissed. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 390 (1994); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). That approach does not appear to have been extended to the criminal context, however, and there is no reason to do so in this case. Indeed, even if vacatur might be an appropriate response to mootness in some criminal cases, it would be particularly inappropriate here.

[9] As the Acting Solicitor General observes (Suggestion at 10), that possibility also militates against granting one of the other pending petitions that presents this same issue.

In the civil context, this Court has traditionally "disposed of moot cases in the manner most consonant to justice . . . in view of the nature and character of the conditions which have caused the case to become moot." *Bonner Mall*, 115 S. Ct. at 391 (internal quotation marks omitted). The "principal condition" relied upon by the Court has been "whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Ibid.* Thus, when a petitioner moots the case by entering into a settlement agreement, he "has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur." *Id.* at 392.

Any mootness resulting from the revocation of petitioner's term of supervised release is directly attributable to petitioner's voluntary misconduct in committing additional federal crimes while on supervised release. "It is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur." 115 S. Ct. at 392. If a voluntary settlement agreement between petitioner and respondent "constitutes a failure of equity that makes the burden decisive" (*ibid.*), *a fortiori* petitioner's voluntary commission of additional crimes precludes him from meeting his heavy burden in this case.

CONCLUSION

While the revocation of petitioner's supervised release in this case clearly raises an issue of mootness, the underlying controversy may not be constitutionally moot. A ruling in petitioner's favor could result in invalidation of the judicial deportation requirement to which he is currently subject, thereby enhancing the theoretical possibility that petitioner might at some point be able legally to reenter the United States. On balance, however, this speculative chain of possibilities is sufficiently attenuated, and the need for this Court's review is sufficiently slight, that the better course would be to vacate the order granting certiorari and dismiss the petition as moot or, in the alternative, to dismiss the writ of certiorari as improvidently granted.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1996

LARRY OSA OGBOMON,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF LARRY OSA OGBOMON, PETITIONER

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INTEREST OF *AMICI CURIAE*

The American Immigration Lawyers Association ("AILA") and the National Association of Criminal Defense Lawyers ("NACDL") submit this brief as *amici curiae* in support of Larry Osa Ogbomon, Petitioner, with the consent of all parties.

Amicus AILA, founded in 1946, is a national non-profit association of immigration, nationality and citizenship lawyers with 34 chapters across the United States and Canada including over 4,200 members. AILA is an affiliated organization of the American Bar Association. AILA's objectives are to advance the administration of law pertaining to immigration, nationality and citizenship; to cultivate the jurisprudence therein; to promote reforms in the laws with regard thereto; and to facilitate the administration of justice therein.

Amicus NACDL was founded over 25 years ago to promote study and research in the field of criminal law; to disseminate and advance knowledge of law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among NACDL's objectives is to ensure the proper administration of criminal justice and to advocate the preservation of constitutional rights in this country. Moreover, NACDL seeks to promote fair and consistent application of laws protecting the rights of individuals, including constitutional and statutory safeguards affecting the rights of non-citizens.

Amici have a profound interest in the development of sound precedent with regard to the constitutionally proper separation of powers among and between the

Congress, the Executive and the Judiciary in creating, administering and defining laws affecting the rights of non-citizens. Criminal defendants are never popular. Aliens (non-citizens)[1] are not often popular, and the pendulum of public (including Congressional) opinion is currently on an anti-alien swing. Criminal aliens, then, represent the nadir of popularity: they also comprise an especially vulnerable group, and present special challenges to counsel and to the courts.[2]

SUMMARY OF ARGUMENT

18 U.S.C. § 3583(d) does **not** authorize a district court to order deportation as a condition of supervised release: at most, it authorizes the district court to order a defendant, as a condition of supervised release, to surrender to the Immigration and Naturalization Service ("INS") for whatever procedures may ensue under the Immigration and Nationality Act ("INA").[3] This majority reading of

[1] As used in this brief, and unless otherwise specified, the terms "citizen" and "non-citizen" refer to those who possess or lack *U.S.* citizenship, since almost everyone is a citizen of *some* country, and very few people are truly "stateless".

[2] "Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land." *Bridges v. Wixon*, 326 U.S. 135, 166 (1945) (Mr. Justice Murphy, concurring).

[3] This is the view of the Solicitor General, and of the First, Second, Fourth, Fifth and Tenth Circuits; in its contrary view the Eleventh Circuit stands alone, and that by a bare majority: the twelve-member en banc panel which decided *U.S. v. Oboh*, 92 F.3d 1082 (11th Cir. 1996), was divided seven-to-five, with the dissent following the position of Petitioner herein.

the statute is most consistent with traditional rules of statutory construction, with the proper separation of powers between the courts and the administrative agencies, and with the constitutional due process and equal protection rights of the accused.

INTRODUCTION

In the past decade, Congress has radically altered the body of immigration law, beginning with the Immigration Reform and Control Act of 1986 ("IRCA"),[4] and on through the Immigration Act of 1990 ("IMMACT90"),[5] the Violent Crime Control and Law Enforcement Act of 1994 ("Crime Bill"),[6] the Immigration and Nationality Technical Corrections Act of 1994 ("INCTA"),[7] and the Anti-terrorism and Effective Death Penalty Act ("AEDPA").[8] Just a few weeks ago Congress enacted the most sweeping immigration reform bill in perhaps the last forty years, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"),[9] which, ironically, President Clinton signed into law on September 30, 1996, the day before the petition for certiorari was granted in the instant case. All of these statutes limit the rights and enlarge the responsibilities of aliens and their

[4] P.L. 99-603, 100 Stat. 3359.

[5] P.L. 101-649, 104 Stat. 4978.

[6] P.L. 103-322, 108 Stat. 2026.

[7] P.L. 103-416, 108 Stat. 4305.

[8] P.L. 104-132, 110 Stat. 1214.

[9] P.L. 104-208, 110 Stat. 3009.

families and employers. Additionally, these statutes increasingly purport to limit the role of the judiciary in reviewing agency action under the immigration laws.

The portion of the statute at issue, however – the last sentence of 18 U.S.C. § 3583(d) – has not been altered since its enactment in 1986. The Eleventh Circuit alone, however, has interpreted this statute to *increase* the district court's power to involve itself in immigration law matters, precisely at a time when Congress and the other Circuits have been moving in the opposite direction.

The relationship between Congress, the agencies (in this case, the INS and the Executive Office for Immigration Review ("EOIR")) and the federal courts is likely to be subject to a time of trial, given the radical and unprecedented peacetime preclusion of review ("court-stripping") provisions of the AEDPA and the IIRAIRA; nevertheless, neither the IIRAIRA, nor the AEDPA, nor any other modification of the immigration laws or criminal sentencing laws of the past decade gives support to the Eleventh Circuit's position.

Criminal defendants in general face increasingly daunting hurdles: see, e.g., §§ 105-106 of the AEDPA (limiting habeas corpus relief); *Felker v. Turpin*, 116 S.Ct. 2333, 135 L.Ed. 2d 827 (1996). When the defendant is a non-citizen, the noose tightens even further: see, e.g., *Hincapie-Nieto v. INS*, 92 F.3d 27 (2nd Cir. 1996) (court-stripping provision of § 440(a) of AEDPA permissible, given that limited habeas corpus relief jurisdiction remains). *Amici* believe that the Eleventh Circuit in *U.S. v. Chukwura*, 5 F.3d 1420 (11th Cir. 1993), cert. denied, 115 U.S. 102 (1994) and in *U.S. v. Oboh*, 92 F.3d 1082 (11th Cir. 1996) (en banc) has breached the limits of what is statutorily and constitutionally possible in this intersection of criminal law and immigration law.

Amici herein agree with the way in which the First, Second, Fourth, Fifth and Tenth Circuits have construed the proper meaning and reach of 18 U.S.C. § 3583(d), in particular, the ways in which those Circuits have approached the historical development of the statute, and the way in which the 10th Circuit, in particular, approached the issues of statutory interpretation and separation of powers, *U.S. v. Phommachanh*, 91 F.3d 1383, 1385-88 (10th Cir. 1996). To supplement those approaches, however, amici herein address the issues of administrative law safeguards and constitutionally-mandated due process and equal protection which the Eleventh Circuit so cavalierly dismisses, *U.S. v. Oboh*, 92 F.3d 1082, 1087 (11th Cir. 1996).

ARGUMENT

I. THE ELEVENTH CIRCUIT'S APPROACH DENIES DEFENDANTS RECOURSE TO CRITICAL ADMINISTRATIVE PROCEDURES AND SAFEGUARDS, AND TO MEANINGFUL JUDICIAL REVIEW.

Amici acknowledge that for some defendants, due to the nature of their criminal histories, there can be no administrative relief, and deportation is the certain sequel to the criminal proceedings.[10] For others, the

[10] See generally, Kowalski, *Sentencing Options for the Deportable Non-Citizen*, 8 Fed. Sent. R. 286 (1996).

sentencing courts may have already invoked either the "judicial deportation" provisions of 8 U.S.C. § 1228(c)(1-4),[11] or the new "stipulated deportation" provisions of 8 U.S.C. § 1228(c)(5)[12] and 18 U.S.C. § 3563(b).[13]

There will always be, however, a significant number of defendants who will be entitled to, and who do not wish to waive their rights to, administrative procedures under the INA to determine their alienage, admissibility, excludability and/or deportability, and relief from removal.[14] For these defendants, the administrative procedures detailed below are critical to their assertion of the right to remain in the United States.

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[11] As renumbered by the IIRAIRA; formerly 8 U.S.C. § 1252a(d).

[12] As added by Sec. 374(a) of the IIRAIRA.

[13] As added by Sec. 374(b) of the IIRAIRA.

[14] The lexicon of immigration law has been radically altered by the IIRAIRA: whereas the INA for forty years or more used the terms "entry", "exclusion", "deportation" and various forms of relief therefrom, the INA as reworked by the IIRAIRA now speaks of "admission", and of a single "removal" hearing process, relief coming in the form of "cancellation of removal". It will take practitioners, the agencies and the courts some time to understand and implement these new concepts.

A. Alienage.

The ultimate defense to deportation[15] is U.S. citizenship: only aliens[16] are subject to deportation. This most precious birthright is not always obvious, especially in the case of a person born abroad to one or more U.S. citizen parents. A long and very complex portion of the INA, 8 U.S.C. §§ 1401-1504, governs U.S. citizenship and nationality by birth, by naturalization, and loss of nationality. A significant body of scholarship and caselaw has built up over the years on this subject.[17]

In the administrative hearing process, the first order of business, upon which all others turn, is the issue of alienage. Under the current system,[18] in exclusion proceedings the burden is on the applicant for admission to establish the fact of U.S. citizenship "to the examining immigration officer's satisfaction", 8 C.F.R. § 235.1(b), failing which he will be treated as an alien; 8 U.S.C.

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[15] The terms "deportation" and "deportability" will be used throughout this brief – and little or no mention will be made of "exclusion" or "removal" – for two reasons; the statute at issue speaks of "deportation"; and the differences between "deportation", "exclusion" and "removal" are not pertinent to this case.

[16] Any person not a citizen or national of the United States; 8 U.S.C. § 1101(a)(3).

[17] *See, e.g.*, Aleinikoff, *The Tightening Circle of Membership*, 22 Hast. Con. L. Q. 915 (1995); *Ablang v. Reno*, 52 F.3d 801 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 701 (1996).

[18] of exclusion or deportation proceedings, which, subject to exceptions not relevant here, will remain in force until April 1, 1997, at which time the new unified "removal" hearing process, instituted by the IIRAIRA, will come into full play.

§§ 1225-26. Similarly, in deportation proceedings, the first allegation in the charging document – the Order to Show Cause – is that the respondent is not a native or citizen of the United States; the burden is on the government to prove that fact by "clear, unequivocal and convincing evidence", 8 C.F.R. § 242.14(a). Finally, in the new "removal" proceedings to take effect next year, it appears that the burden is on the government to prove alienage by "reasonable, substantial, and probative evidence"[19] before any deportation order may enter.

Immigration attorneys, INS attorneys and Immigration Judges are experienced in handling the situation when the respondent in proceedings – alleged to be an alien – raises a citizenship defense. The matter is treated with the utmost seriousness and care. Extra time is taken and extreme caution is exercised by all parties, since the ultimate travesty of justice in immigration law is the deportation of a U.S. citizen, which is always unconstitutional, *Ng Fung Ho v. White*, 259 U.S. 276 (1922). Once citizenship is established and is uncontested, proceedings are terminated.

In contrast, the question arises whether the district courts within the Eleventh Circuit, when implementing 18 U.S.C. § 3583(d), have taken or will take the same care in determining the primordial issue – alienage? The statute speaks simply of "an alien defendant . . . subject to deportation", without any further statutory or regulatory

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[19] New INA Sec. 240(c)(3)(A), added by Sec. 304 of the IIRAIRA.

reference to the manner in which alienage itself is determined. Are prosecutors, defense attorneys, pretrial service officers, probation officers, and district courts currently aware that alienage is not self-evident? Is alienage being presumed due to name or appearance or accent? Have defendants who unknowingly enjoy U.S. citizenship by descent or derivation been wrongfully deported under 11th Circuit doctrine?

The administrative process safeguards the precious birthright of U.S. citizenship, the ultimate defense against deportation. The Eleventh Circuit's implementation of 18 U.S.C. § 3583(d), without more, does not, and for this reason alone, should not be permitted to continue.

B. Deportability.

Once alienage is established, in the administrative hearing process, the next order of business is to determine whether or not the alien is deportable (or admissible or excludable or removable) under the lodged charge or charges. The current grounds[20] of excludability and deportability are extensive, and by no means intuitive: most importantly, no court sitting in a criminal case should assume that the criminal charge at bar necessarily triggers an exclusion or deportation ground.

Under current exclusion hearing law, the burden is on the alien to prove admissibility, with two important exceptions: if a U.S. consular post has issued a visa, it is prima facie evidence of admissibility, sufficient to shift

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[20] INA Secs. 212 & 241, 8 U.S.C. §§ 1182 & 1252.

the burden to the INS, *Matter of Walsh & Pollard*, Int. Dec. 3111 (BIA 1988); and, if the applicant is a returning resident, the INS has the burden of proving inadmissibility, and the applicant is entitled to full due process rights, *Landon v. Plasencia*, 459 U.S. 21 (1982).

Under current deportation hearing law, the INS must prove deportability (as well as alienage) by "clear, unequivocal and convincing evidence", 8 C.F.R. § 242.14(a). Under the coming removal hearing law, if the alien is applying for admission, the alien will have the burden of proving "clearly and beyond doubt [that he is] entitled to be admitted and is not inadmissible",[21] whereas if the alien has been lawfully admitted, and the INS seeks to deport (remove) him, the INS will have the burden of proving deportability by "clear and convincing evidence".[22]

In contrast, neither the text nor the context of 18 U.S.C. § 3583(d) gives any guidance as to how deportability is to be determined, nor by whom, nor does it state who has what burden of proof, if any. Further, at this juncture it is important to highlight that 18 U.S.C. § 3583(d) speaks of an alien defendant "subject to deportation", without specifying whether said deportability is triggered by the conviction at bar, or prior conduct, or both.

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[21] New INA Sec. 240(c)(2)(A), added by Sec. 304 of the IIRAIRA.

[22] New INA Sec. 240(c)(3)(A), added by Sec. 304 of the IIRAIRA.

Immigration practitioners know that, while in many cases deportability is conceded at the initial pleading stage (and that the deportability of an alien convicted of an "aggravated felony"[23] is conclusively presumed by statute[24]), in many other cases the battle is won or lost over the issue of deportability. When deportability is in doubt, the doubt is resolved in favor of the alien: *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948); *Matter of Hou*, Int. Dec. 3178 (BIA 1992). Again, as with the primordial issue of alienage, do prosecutors, defense counsel, courts and ancillary staff have any understanding of the grounds of exclusion and deportation? Are courts in the 11th Circuit willing to take the time to determine whether, in fact, the convictions at bar trigger any of those grounds? Are defense counsel willing and prepared to challenge a court's finding of deportability?[25]

The current administrative hearing process provides a time-tested forum in which to determine and challenge deportability. The 11th Circuit's interpretation of 18 U.S.C. § 3583(d) does not.

C. Relief and Administrative Review.

In the administrative hearing process, once alienage and deportability (or excludability or inadmissibility)

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[23] INA Sec. 101(a)(43), 8 U.S.C. § 1101(a)(43).

[24] INA Sec. 242A(c), 8 U.S.C. 1252a(c).

[25] Note that in several jurisdictions, failure of defense counsel to advise the defendant of the immigration consequences of a conviction could render the assistance of counsel ineffective: *see, e.g., People v. Pozo*, 746 P.2d 523 (Colo. 1987).

have been established, the parties explore avenues of relief. Indeed, applications for relief from exclusion and deportation are a mainstay in administrative exclusion and deportation hearings. Immigration counsel, INS counsel, and Immigration Judges routinely deal with applications for withdrawal of application for admission,[26] admission based on waivers,[27] asylum,[28] withholding of deportation,[29] suspension of deportation,[30] and voluntary departure.[31] The Immigration Judge has an affirmative duty to advise the alien of "apparent eligibility" for relief from deportation. 8 C.F.R. § 242.17(a).

18 U.S.C. § 3583(d), however, appears to bar any and all relief from deportation. Of course, some defendants will be aliens, will be deportable, and will be ineligible for any relief from deportation, due to the conviction at hand, or prior conduct, or a combination of the two. Others, however, would be eligible for relief – if they were afforded administrative hearings before Immigration Judges. For example, if an alien who had been a lawful permanent resident for more than seven years were convicted of any of certain federal misdemeanors not involving weapons, controlled substances, or a "crime of violence" or other "aggravated felony" under the INA, and were sentenced to probation, under the

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[26] *Matter of Lepofsky*, 14 I&N Dec. 718 (BIA 1974).

[27] such as INA Secs. 212(c), (d)(3), (e), (g), (h), or (i), 8 U.S.C. §§ 1182(c), (d)(3), (e), (g), (h), or (i).

[28] INA Sec. 208, 8 U.S.C. § 1158.

[29] INA Sec. 243(h), 8 U.S.C. § 1253(h).

[30] INA Sec. 244(a), 8 U.S.C. § 1254(a).

[31] INA Sec. 244(e), 8 U.S.C. § 1254(e).

current statutory scheme the alien may be eligible for relief from deportation. This relief, however, can only be given by the Immigration Judge in an exclusion or deportation hearing. Moreover, many forms of relief involve the exercise of the Attorney General's discretion, discretion specifically delegated to the Immigration Judges and the Board of Immigration Appeals ("BIA" or "Board"), but not to federal district court judges. In sum, there is no mechanism under 18 U.S.C. § 3583(d) by which the district court may determine eligibility for relief and grant relief, especially discretionary relief.

After a hearing before an Immigration Judge, either party may take an administrative appeal to the Board, a body of twelve attorneys within the Executive Office for Immigration Review ("EOIR").[32] The Board is a creature of regulation, but has been in continuous existence, in one form or another, for over forty years. Its institutional memory and expertise, though often challenged by the immigration bar in the federal courts, is substantial. Its body of caselaw is the primary focus of study and litigation by the immigration bar, and is, after the Constitution, the INA, the regulations, and federal caselaw, the main source of authority for the day-to-day implementation of the INA. It issues thousands of unpublished decisions each year; published decisions, designated as precedents, are binding.[33]

During the pendency of an appeal to the Board, an order of exclusion or deportation by an Immigration

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[32] 8 C.F.R. §§ 3.0-3.8.

[33] 8 C.F.R. § 3.1(g).

Judge is stayed.[34] The Board, having the full authority of the Attorney General to take such action "as is appropriate and necessary for the disposition of the case",[35] may affirm or reverse the decision of the Immigration Judge, including any credibility determination, may review the facts and the law *de novo*, may take administrative notice of new facts, and may, at times, consider new evidence not adduced at hearing.[36]

Under pre-IIRAIRA law, the Board has been, for many, the *de facto* last stop. Although judicial review (below) has been review as a matter of right, the cost of counsel has prohibited most from challenging adverse Board decisions. As the IIRAIRA becomes fully implemented, the Board may become, *de jure*, the court of last resort, if the IIRAIRA's preclusion of review provisions are upheld. Although the Board is often criticized by the immigration bar and sometimes by the courts,[37] it has nonetheless provided a necessary, intelligent, more dispassionate and humane forum for the review of the decisions of Immigration Judges;[38] at the very least, its vast institutional experience is a resource of immense importance to the INS and the immigration bar.

Deportation by court decree under the Eleventh Circuit's reading of 18 U.S.C. § 3583(d), however, deprives

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[34] 8 C.F.R. § 3.6.

[35] 8 C.F.R. § 3.1(d)(1).

[36] *See, e.g., Charlesworth v. U.S.I.N.S.*, 966 F.2d 1323 (9th Cir. 1992).

[37] *See, e.g., Salameda v. INS*, 70 F.3d 447 (7th Cir. 1995).

[38] *See, e.g., Matter of Kasinga*, Int. Dec. 3278 (BIA 1996).

the defendant of this critical step in the decisional process. Federal district courts, no matter how often they hear immigration cases, will never match the institutional memory of the Board.

D. Judicial Review.

The IIRAIRA has wrought a revolution in the judicial review of agency action under the immigration laws. It may take years to achieve stability or clarity with respect to issues of constitutionality, jurisdiction, venue and time limitations. In general, the judicial review provisions of the IIRAIRA, Sec. 306(a)(2), create a new INA Sec. 242, entitled "Judicial Review of Orders of Removal", and create a unitary petition for review process to review "all final orders of deportation or removal", IIRAIRA Sec. 306(c)(1). The jurisdictional provisions, effective dates, and transitional rules, however, of IIRAIRA Secs. 306 and 309 are unclear, conflicting, and may be unconstitutional. It is not at all clear that the IIRAIRA judicial review provisions would apply to Petitioner's case. For purposes of this brief, then, the discussion will focus on pre-IIRAIRA judicial review of final orders of deportation and exclusion.

Under pre-IIRAIRA law, an alien in exclusion proceedings may seek direct judicial review of an adverse BIA decision via a petition for writ of habeas corpus in district court, under INA Sec. 106(b), 8 U.S.C. § 1105a(b). An alien in deportation proceedings may seek direct judicial review of an adverse BIA decision via petition for review in the circuit court of appeals, under INA Sec. 106(a), 8 U.S.C. § 1105a(a). On review, the district court or

circuit court may affirm or reverse the BIA's decision, or remand for further action. Over the years, hundreds if not thousands of aliens have had deportation or exclusion orders overturned only through the mechanism of direct judicial review, a matter of statutory right.

The 11th Circuit in *U.S. v. Oboh*, 92 F.3d 1082 at 1087, intimates that sufficient judicial review of an order of deportation under 18 U.S.C. § 3583(d) is afforded "through appellate review of the conviction and the sentence." As shown above, however, there appear to be no mechanisms within 18 U.S.C. § 3583(d) to determine alienage, deportability, and eligibility for relief from deportation at the district court level. Under these circumstances, there would not be a sufficient basis for a circuit court, on "appellate review of the conviction and sentence", to review a district court's decisions on issues of alienage, deportability and relief. From the reported decision, the sum total of "due process" afforded to Mr. Oboh appears to have been the following: at a sentencing hearing, the government offered an INS document "revealing" that Oboh had entered the U.S. unlawfully; Oboh objected to the introduction of the document; apparently over objection, the district court found that Oboh entered the U.S. unlawfully; and, based on that finding, the district court ordered Oboh deported as a condition of supervised release.

On appeal, the circuit court "summarily reject[ed] Oboh's argument that the district court's order of deportation denied him due process. The plain language of 3583(d) gave Oboh sufficient notice that the district court could deport him as a condition of supervised release upon a finding that he was 'subject to deportation.' "

Oboh at 1087-88. From the reported decision it seems clear that neither the district court nor the circuit court dealt in any meaningful fashion with the issues of alienage, deportability and relief. Moreover, it appears that the burden of disproving deportability was placed on Mr. Oboh, with no defined standard of proof.

If, at a sentencing hearing, a defendant, alleged to be an alien, were to raise a citizenship defense, or to challenge deportability, or to ask for relief from deportation, the district court, under the 11th Circuit's view, would apparently have unlimited authority to nevertheless find that the defendant was an alien, subject to deportation. In Mr. Oboh's case, all it took was an INS document "revealing" (not, apparently, proving, by any standard or burden of proof) his unlawful entry. Further, it appears that the 11th Circuit would not challenge such a finding, reducing judicial review to a nullity.

The pre-IIRAIRA scheme of administrative hearings under the INA, followed by judicial review, provides a time-tested method for adjudicating the issues of alienage, deportability and relief. The 11th Circuit's approach provides none, and should be rejected. "[W]hen fundamental rights are in question, this Court has repeatedly emphasized 'the difference in security of judicial over administrative action.' " *Crowell v. Benson*, 285 U.S. 22, 62 (1932), citing *Ng Fung Ho v. White*, 259 U.S. 276 (1922).

II. THE ELEVENTH CIRCUIT'S APPROACH VIOLATES DEFENDANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

A. Due Process.

While this Court has never gone so far as to classify deportation as a criminal punishment, nevertheless the Court has recognized that deportation ranks as one of the most severe civil sanctions in the law. "[D]eportation is a drastic measure and at times the equivalent of banishment or exile. . . . Such a forfeiture is a penalty." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). Analytically, the threat of deportation touches on the defendant's liberty interests; his freedom from detention and his freedom to remain in the United States: "Here the liberty of an individual is at stake. . . . Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).[39]

Under the 5th Amendment, no person – whether citizen or alien – may be deprived of liberty without due

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[39] Prolonged detention is not merely an academic issue: for example, the 9th Circuit, en banc has recently held (erroneously, in the opinion of *amici*) that excludable Mariel Cubans who have been criminally convicted and who have fully served their sentences may be subsequently detained by the Attorney General indefinitely, given Cuba's refusal to accept their repatriation. *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995). Even in the case of a non-Cuban alien, if an INS detainer is placed on an alien defendant, his opportunities for halfway house placement, shock incarceration program (18 U.S.C. § 4046) and the like, are nullified, thus lengthening his incarceration.

process of law. Reduced to its barest outlines, due process requires that the accused be heard. "[I]t is not competent for [agency officers to] arbitrarily cause an alien, who has entered this country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized." *Yamayata v. Fisher*, 189 U.S. 86, 100-101 (1903).

With this constitutional mandate as a backdrop, current[40] administrative exclusion and deportation procedures (and judicial deportation procedures, with the exception of 18 U.S.C. § 3583(d) as interpreted by the 11th Circuit) exhibit certain salient features:

– service on the respondent of written factual allegations and charges of violations of law;[41]

– advice to the respondent that he may be represented by counsel;[42]

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[40] pre-IIRAIRA

[41] INA §§ 242(b)(1) & 242A(d)(2)(B), 8 U.S.C. §§ 1252(b)(1) & 1252a(d)(2)(B); 8 C.F.R. §§ 235.6(a) & 242.1(b).

[42] INA § 242(b)(2), 8 U.S.C. § 1252(b)(2); 8 C.F.R. §§ 236.2(a) & 242.1(c).

– advice to the respondent that he may examine the evidence against him, present his own evidence, and cross-examine government witnesses;[43] and

– further administrative and/or judicial review.[44]

This process of notice, right to counsel, hearing, and appellate review has developed by accretion, beginning from the dark days when aliens had, at most, cursory examination by agents of the executive branch, subject to cursory judicial review by petition for writ of habeas corpus.[45] Due process for aliens no longer means whatever minimal process Congress decides to give: "[T]he Court[46] really could not have meant carte blanche for Congress in the treatment of excludable aliens. Surely, had Congress revived trial by ordeal, or the ducking stool, or gladiatorial contests as the procedures for deciding who could enter, the Court – even the Court of the early 1950's – would have found a way to strike down such a practice."[47]

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[43] INA §§ 242(b)(3) & 242A(d)(2)(D); 8 U.S.C. §§ 1252(b)(3) & 1252a(d)(2)(D); 8 C.F.R. §§ 236.2(a) & 242.16.

[44] INA §§ 236(b) & 242A(d)(3), 8 U.S.C. §§ 1226(b) & 1252a(d)(3); 8 C.F.R. §§ 236.7 & 242.21.

[45] For a summary, *see Heikkila v. Barber*, 345 U.S. 229 (1953).

[46] in *Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

[47] Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U.Pitt.L.Rev. 165, 173 (1983).

Given the liberty interests at issue, the evolution of the due process rights of non-citizens is not surprising.[48] The 11th Circuit's reading of 18 U.S.C. § 3583(d), however, harks back to the darkest, earliest days of immigration law: Mr. Oboh, for example, was ordered deported solely on the strength of a document (of unknown admissibility under the rules of evidence) which purported to "reveal" that he had entered the U.S. unlawfully, resulting in deportation by administrative revelation and judicial decree, not due process of law.

Amici support the textual approaches used by the other Circuits in interpreting 18 U.S.C. § 3583(d), and understand that the Court has an interest in resolving cases by means other than constitutional analysis, but respectfully suggest that a constitutional due process analysis should be brought to bear in this case as well. In doing so, the Eleventh Circuit's approach will be shown to be constitutionally infirm.

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[48] That evolution is about to take a new turn: much of the law of constitutional due process and equal protection for aliens has turned on the issue of whether the alien was in "exclusion" or "deportation" proceedings, and whether the alien had any prior status (such as lawful permanent resident status), so as to increase his "stake" in the process. See, e.g., Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 Const. Comm. 9 (1990); Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum.L.Rev. 1625 (1992); Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. (1990). Now, in the nascent IIRAIRA epoch, given the IIRAIRA's unitary "removal" hearing process to determine "admissibility", it remains to be seen how the Court will shape or re-shape the contours of constitutional due process and equal protection for aliens.

B. Equal protection.

> "Caprice in the incidence of punishment is one of the indicia of tyranny, and nothing can be more disingenuous than to say that deportation in these circumstances is not punishment. It is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality once granted, shall not be subject to meaningless and irrational hazards."

DiPasquale v. Karnuth, 158 F.2d 878, 879 (2nd Cir. 1947) (Learned Hand, J.).

In the instant case, the caprice, the meaningless and irrational hazard, is the bad luck of alien defendants to be sentenced in the Eleventh Circuit. The Eleventh Circuit alone gives district courts the choice of using judicial deportation procedures which comply with constitutional due process requirements, or remanding the alien to the INS for administrative deportation procedures, which likewise comport with constitutional due process requirements – or, without reason or warning, applying 18 U.S.C. § 3583(d) as interpreted by the Eleventh Circuit to effect a "quick and dirty" judicial deportation, without any constitutional due process.

> "It has long been held that the constitutional promise of equal protection of the laws applies to aliens as well as citizens. *Yick Wo v. Hopkins*, 118 U.S. 356 . . . (1886). . . . Under the minimal scrutiny test, . . . distinctions between different classes of persons "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all

> persons similarly circumstances shall be treated alike." *Stanton v. Stanton*, 421 U.S. 7 . . . (1975)."

Francis v. INS, 532 F.2d 268, 272 (2nd Cir. 1976).

The application of the "arbitrary distinction" test for equal protection analysis was evident in *Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994). Prior to *Garberding*, the BIA had held that expungements under the Federal First Offender Act (FFOA) or state equivalents erased certain drug convictions so as not to trigger certain grounds of deportability, but that the state expungements were not recognized where the state statute allowed expungement of drug offenses more serious than the mere possession covered by the FFOA. In *Garberding*, the 9th Circuit ruled that the BIA's rule violated equal protection, because the states varied in their expungement laws:

> "Here, there is no rational basis for treating Garberding differently. Had she possessed her marijuana in Michigan, Virginia or Wisconsin, she would not have been subject to deportation. These states have expungement statutes which are the exact counterpart of the FFOA. Garberding had the bad luck or poor judgment to possess her marijuana in Montana. The state legislature in Montana has seen fit to extend the privilege of expungement to persons who are convicted of drug offenses more serious that Garberding's simple first time possession. It is this fortuitous circumstance, not Garberding's conduct, which the INS used to distinguish her for deportation. This may indeed reflect a policy of harsh treatment of aliens who commit drug offenses, but distinguishing Garberding for deportation because of the breadth of Montana's expungement statute, not because of what she

> did, has no logical relation to the fair administration of the immigration laws or the so-called 'war on drugs.' "

Garberding at 1990-91.

Similarly, in the instant case, under *Yick Wo,* this Court should not permit the Eleventh Circuit alone to interpret 18 U.S.C. § 3583(d) in a much broader way than all other Circuits. To paraphrase the *Garberding* court, distinguishing Mr. Ogbomon for judicial deportation under 18 U.S.C. § 3583(d) because of the breadth of the Eleventh Circuit's reading of that statute, not because of what he did, has no logical relation to the fair administration of the federal criminal code. Constitutional equal protection includes protection against disparate treatment based on geographical chance.

CONCLUSION

The Eleventh Circuit's interpretation of 18 U.S.C. § 3583(d) permits district courts to directly order the deportation of certain defendants, bypassing critical administrative and judicial procedural safeguards, in violation of the defendants' constitutional due process and equal protection rights. *Amici* respectfully pray for an order vacating the decision below and remanding for a decision consistent with the views expressed herein and with the interpretations of the First, Second, Fourth, Fifth and Tenth Circuits.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1996

LARRY OSA OGBOMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

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STATEMENT OF INTEREST

The American Bar Association ("ABA") is a voluntary national membership organization of the legal profession, with over 390,000 members representing every state and territory and the District of Columbia.[1] The ABA's membership includes prosecutors, public defenders, attorneys in private practice, trial and appellate judges at the state and federal levels, legislators, law professors, law enforcement and corrections personnel, law students, and non-lawyer "associates" in allied fields.

The ABA has an historic interest in questions concerning the administrative and judicial review of claims by aliens seeking fair enforcement and implementation of our nation's immigration laws. One long-standing policy of the ABA is to ensure adequate due process safeguards in proceedings regarding the application of immigration laws. Consistent with this interest, the ABA's policymaking House of Delegates created the Coordinating Committee on Immigration Law in 1983. This committee, made up of representatives of nine ABA entities with immigration law expertise, has sponsored immigration law seminars and training programs, assisted organizing numerous pro bono immigration representation efforts and educated volunteer attorneys from the private bar to

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[1] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial or individual member of the American Bar Association. No inference should be drawn that any member of the Judicial Division has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

counsel aliens regarding the applicability of United States immigration laws.

The ABA also has an active and direct interest in the efficient and equitable administration of justice for aliens, including the right to due process protections in exclusion, deportation and asylum proceedings as well as securing the right to counsel in immigration proceedings generally. The ABA has previously submitted briefs as *amicus curiae* in several matters concerning the rights of aliens, including *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991), and *Ardestani v. INS*, 502 U.S. 129 (1991).

The ABA appears as *amicus curiae* in the case at bar because the question presented raises serious issues regarding the due process rights of defendants facing possible deportation orders by federal district judges at the time of criminal sentencing. As discussed herein, the practice upheld by the Eleventh Circuit of sentencing defendants to deportation as a condition of supervised release, without adequate notice or opportunity to contest deportability or apply for relief, improperly deprives defendants of their constitutional due process rights.

Counsel for the Petitioner and the United States have consented to the participation of the ABA as *amicus curiae* in this matter.

SUMMARY OF ARGUMENT

This Court and the lower federal courts consistently have articulated and demanded that deportability determinations, which implicate protected liberty interests, must adhere to due process standards. Over the years, this Court in particular has played a significant and critical role in assuring that aliens within the United States who are facing possible deportation are accorded basic due process protections and that administrative deportation proceedings comply with due process requirements.

The case at bar raises due process considerations for a particular class of defendants: those who are aliens or who are suspected of being aliens and who have been convicted of a criminal offense and are awaiting sentencing by a federal district court judge. In this case, the district court, as part of the criminal sentence imposed, ordered the Petitioner to be deported from the United States upon the completion of his term of imprisonment, as a condition of supervised release. The district court imposed this portion of the sentence, over Petitioner's objection, pursuant to a criminal statute, 18 U.S.C. § 3583(d), which provides in relevant part:

> If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

Id. The Eleventh Circuit Court of Appeals affirmed the sentencing order after construing section 3583(d) as authorizing federal district judges to impose deportation orders on alien defendants at sentencing.

Due process of law, however, requires that any person in the United States facing potential deportation – including an alien defendant awaiting criminal sentencing – be afforded basic constitutional protections. For example, (a) the defendant must receive adequate notice of the deportability charges, (b) the defendant's alienage and deportability must first be established by clear, unequivocal and convincing evidence, (c) the defendant must be afforded a meaningful opportunity to contest alienage and deportability allegations, and (d) once alienage and deportability are established, the alien defendant must be afforded the opportunity to apply for any relief from deportation for which he or she may be eligible under the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1557 (1994). The Petitioner did not receive these basic protections.

The summary deportation order and consequent due process violations encountered by the Petitioner were not unique. Indeed, the sentencing practices by federal district judges in the Eleventh Circuit, under the "authority" of section 3583(d), have led to the imminent deportation of other defendants based solely on district court deportation orders, and many other defendants inevitably will be affected as well. Many defendants first learn of the possibility of deportation at their sentencing hearings and are given no meaningful opportunity to contest their deportability status or present evidence as to why they should not be deported. These summary deportation orders are entered without regard to the defendant's status under the immigration laws and without any consideration as to whether the defendant is a lawful permanent resident of the United States, whether the

defendant's immediate family members (including spouses, parents and children) may be United States citizens, the length of time the defendant has been in the United States or whether the defendant is eligible for relief from deportation such as political asylum or withholding of deportation. *See, e.g.*, 8 U.S.C. §§ 1158(a), 1253(h). As a result, these deportation orders do not provide due process of law and improperly deprive defendants of other rights and benefits for which they may be eligible under the INA.

The initial inquiry for the Court is whether 18 U.S.C. § 3583(d) authorizes federal district court judges to order defendants deported at the time of criminal sentencing. The Petitioner and the Solicitor General assert that, under a traditional statutory construction analysis, section 3583(d) merely authorizes the district courts, under certain circumstances, to require alien defendants to be delivered to the Attorney General for deportation proceedings. The ABA supports this statutory construction analysis, which we understand will be presented to the Court by the Petitioner and the Solicitor General, and the ABA does not repeat their legal analyses in this *amicus curiae* brief.

However, even if section 3583(d) is interpreted to authorize federal district judges to determine a defendant's alienage and deportability, and to order his or her deportation as a condition of supervised release, the ABA believes that the sentencing court must – consistent with due process and procedural safeguards – provide adequate notice of the court's intent to impose such a sentence, ensure that the defendant's deportability is proven

by the requisite clear, unequivocal and convincing standard, allow the defendant a reasonable opportunity to contest the deportability charge, and enable the defendant to seek any relief from deportation for which he may be eligible. Neither the Petitioner nor many other defendants sentenced within the Eleventh Circuit under section 3583(d) were afforded these basic protections. Whether or not Congress intended to create co-extensive jurisdiction in the Executive and Judicial Branches to adjudicate deportability in the first instance, no interpretation of section 3583(d) should result in the denial to any person facing possible deportation of his constitutional rights or protections in adjudication otherwise available under the immigration laws.

ARGUMENT

1. This action raises the fundamental question of whether due process and other protections traditionally afforded persons facing possible deportation may be bypassed when the question of the person's deportability first arises in the context of a federal district court sentencing hearing. The statute at issue, 18 U.S.C. § 3583(d), authorizes a federal district court, at the time of an "alien defendant's" sentencing, to provide for the defendant's deportation as a condition of supervised release. While the Petitioner and the Solicitor General assert – and the First, Second, Fourth, Fifth, Ninth and Tenth Circuits have concluded – that section 3583(d) only authorizes the district judge to refer an alien defendant to the Attorney General for deportation proceedings in accordance with the INA, the Eleventh Circuit Court of Appeals has been

construing the statute as authorizing the district courts to order defendants deported, thereby depriving these persons of their due process rights with respect to the deportation component of their criminal law proceedings.[2]

The ABA supports the view that 18 U.S.C. § 3583(d) does not authorize federal district courts to order the deportation of alien defendants. Instead, the statute permits the court to facilitate and expedite deportation proceedings by the Attorney General, in accordance with immigration laws and due process, as a sentencing condition. To the extent the legal bases for similar views of the Petitioner and the Solicitor General will be set forth in their briefings as parties, the ABA, as *amicus curiae*, does not recite the legal authorities here.

The ABA's further interest arises out of its concern that section 3583(d) should not be interpreted in a manner that deprives defendants of their Fifth Amendment due process and other procedural rights to contest deportability merely because the question of deportability arises as a part of sentencing in federal district court, rather than in administrative proceedings instituted by the Attorney General in accordance with the INA. The ABA's concern is heightened by the fact that defendants within the Eleventh Circuit have been sentenced to

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[2] Being foreign born, alone, does not mean that a person is an "alien." Further, being an "alien" does not necessarily render a defendant appearing before a district court for sentencing a deportable alien. Nothing in the language of 18 U.S.C. § 3583(d), nor in the INA, authorizes district courts to order an alien deported as a condition of supervised release, without any determination as to whether the defendant is an alien and is deportable under the INA.

deportation as a condition of supervised release, pursuant to 18 U.S.C. § 3583(d), without any due process. Many of these defendants currently are serving sentences of incarceration and will be subject to immediate deportation upon the completion of their prison terms, whether or not their alienage and deportability properly have been established.

Common denominators among these defendants include the lack of adequate notice of deportation, the lack of any meaningful opportunity before the district court to contest deportability, and the lack of opportunity to apply for mandatory or discretionary relief from deportation. Under the sentencing practice at issue in this case, the defendant often receives no advance notice of the possibility of deportation but instead learns of his fate for the first time at the actual sentencing hearing, when the district judge imposes the sentence. The sentencing courts do not routinely make findings regarding alienage and deportability, nor do they adhere to the requirement imposed by this Court that deportability must be established by clear, unequivocal and convincing evidence.

One example of the cursory treatment of deportability by a sentencing judge under section 3583(d) is found in *United States v. Oboh*, 92 F.3d 1082 (11th Cir. 1996) ("*Oboh II*"), the case in which the divided *en banc* court of appeals decided that district judges could order deportations at sentencing. Oboh, one of the defendants in that consolidated appeal, was before the district court for sentencing after pleading guilty to producing false drivers' licenses. The harsh factual circumstances of Oboh learning of his deportation sentence, and his objections to that portion of his sentence, are recounted in the prior

panel decision of the court, *United States v. Oboh*, 65 F.3d 900 (11th Cir. 1995) ("*Oboh I*"), which was later vacated by the *en banc* court, 70 F.3d 87 (11th Cir. 1995), prior to the issuance of *Oboh II*. In the panel decision, Judge Barkett was sharply critical of the procedure employed by the district court:

> It was not until the end of the sentencing hearing, when the district court ordered Oboh to be deported, that he was made aware of any possible deportation. Neither the portion of the probation officer's presentence report which Oboh received nor any governmental action indicated that the subject of his deportability would be taken up at his sentencing. We find that Oboh was not afforded adequate notice or opportunity at his sentencing hearing to respond to the probation officer's recommendation that he be deported. In fact, it appears that Oboh was never even made aware of the basis for the recommendation.

Oboh I, 65 F.3d at 902. In reversing the panel decision and upholding the deportation sentencing order, the *en banc* court did not contest the panel's findings, nor did it make any further inquiries or findings regarding the defendant's alienage or deportability, notwithstanding Oboh's long term presence in the United States and the fact that he had protested to the district court and the court of appeals that he was not in fact deportable. *Oboh II*, 92 F.3d at 1084, 1088.[3]

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[3] The other defendant discussed in *Oboh II*, Bowen, objected to the district court's deportation order under 18 U.S.C. § 3583(d) and claimed that he was improperly precluded from

If the defendants subject to these summary deportation orders at sentencing had been afforded adequate notice of the deportability charges and reasonable opportunities to contest that status, to obtain specialized counsel familiar with immigration laws, to present witnesses in their behalf and to apply for relief from deportation (including withholding of deportation and asylum),[4] the deportation sentences might not have been imposed. Further, had one of these defendants received this type of cursory treatment in administrative deportation proceedings initiated by the Attorney General under the INA, the appellate courts, on a petition for review under the INA, 8 U.S.C. § 1105a, or the district courts, on habeas corpus review pursuant to 8 U.S.C. § 1105a(b), would have remanded the case to the agency to enable the alien to

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applying for asylum in the United States. 92 F.3d at 1084. Bowen did not raise any due process claims on appeal. 92 F.3d at 1087 n.8.

[4] If an alien meets the statutory requirements for withholding of deportation under 8 U.S.C. § 1253(h), the Attorney General is prohibited from deporting the alien. *See Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549, 2553 (1993). If an alien claims eligibility for asylum under 8 U.S.C. § 1158(a), as was the case in *Oboh II*, and the alien meets the criteria for statutory eligibility for asylum as a "refugee," 8 U.S.C. § 1101(a)(42), the statute requires the "Attorney General" to make a determination as to whether the alien should be granted such relief in the exercise of discretion. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987). There is no indication that the criminal sentencing statute at issue in this case, 18 U.S.C. § 3583(d), was intended by Congress to authorize federal district courts to exercise such discretion.

contest deportability and apply for relief, and chided the Board of Immigration Appeals ("BIA") for failing to afford these basic protections to the alien. *See, e.g., Bigby v. INS*, 21 F.3d 1059, 1064 (11th Cir. 1994) (granting petition for review and remanding the case to the BIA due to failure to properly establish alien's deportability); *Bui v. INS*, 76 F.3d 268 (9th Cir. 1996) (granting petition for review and remanding to BIA because of failure to properly apprise alien of possible eligibility for relief from deportation). The result should be no different where the deportability issue is addressed in the first instance by the district court rather than in administrative proceedings.

Accordingly, if this Court nevertheless upholds the Eleventh Circuit's interpretation of 18 U.S.C. § 3583(d) as authorizing federal district courts to make deportability determinations as part of criminal sentencing, the ABA respectfully submits that the "deportation" portion of Petitioner's sentence must be vacated and the case remanded to enable the Petitioner to challenge deportability and apply for whatever relief from deportation he may be eligible for in accordance with his due process rights.

2. This Court consistently has recognized that the consequences of deportation may be severe. *See Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (Brandeis, J.) (deportation may "result . . . in loss of both property and life; or of all that makes life worth living."); *INS v. Cardoza-Fonseca*, 480 U.S. at 449 ("Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country."); *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment

or exile."); *cf. Woodby v. INS*, 385 U.S. 276, 285 (1966) ("This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification.").[5]

It also is well established that deportation implicates protected liberty interests which may not be taken away without due process of law. *See Yamataya v. Fisher*, 189 U.S. 86, 100-101 (1903) ("No such arbitrary power can exist where the principles involved in due process of law are recognized."); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (aliens entitled to due process and equal protection under the Constitution); *Ng Fung Ho v. White*, 259 U.S. at 284-85 ("[T]he Fifth Amendment affords protection in its guarantee of due process of law."); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("Meticulous care must be exercised lest

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[5] *See also Ardestani v. INS*, 502 U.S. at 140 (Blackmun, J., dissenting) ("The alien's stake in the proceeding is enormous (sometimes life or death in the asylum context); the legal rules surrounding deportation and asylum proceedings are very complex; specialized counsel are necessary but in short supply; and evidence suggests that some conduct on the part of the Government in deportation and asylum proceedings has been abusive."). Lower courts have recognized the severity of deportation: *Padilla-Agustin v. INS*, 21 F.3d 970, 978 (9th Cir. 1994) ("When an alien faces the threat of deportation the stakes are high. If he loses, he will be removed from this country – a promised land for many. He may face deprivation, torture or even death when he is returned to his homeland. He may also lose contact with his family and friends."); *United States v. Concepcion*, 795 F. Supp. 1262, 1273 (E.D.N.Y. 1992) ("Perhaps the most severe punishment that can be imposed on these defendants is to banish them from the United States.").

the [deportation] procedure . . . not meet the essential standards of fairness."); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (Due Process clause applies in exclusion hearing); *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985).

Fundamental due process principles may not be disregarded because of a person's alienage or his immigration status. *Yamataya v. Fisher*, 189 U.S. at 101 (illegal aliens entitled to due process protections); *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953) ("aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to . . . constitutional protection.").[6]

"An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice

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[6] While due process must be "flexible" to provide protections in varying situations, *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), its application generally involves three considerations: (1) the private interest at stake; (2) the risk of an erroneous deprivation of that interest under the circumstances at issue, and the probable value of additional or substitute safeguards; and (3) the government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Plainly, "the private liberty interests involved in deportation proceedings are among the most substantial." *Padilla-Agustin v. INS*, 21 F.3d at 974 (*citing INS v. Cardoza-Fonseca; Bridges v. Wixon, supra*).

and opportunity for hearing.' " *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)); *see also Landon v. Plasencia*, 459 U.S. at 39 (Marshall, J., concurring in part and dissenting in part) ("To satisfy due process, notice must . . . be provided sufficiently in advance of the hearing to 'give the charged party a chance to marshal the facts in his defense' "). Due process also requires that the opportunity to be heard be afforded "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Where fundamental principles of due process have not been afforded to aliens facing possible deportation, the courts have struck down such practices. *See Bridges v. Wixon*, 326 U.S. at 156 (deportation order entered in violation of due process because of denial of fair hearing); *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1029 (9th Cir. 1992) ("To deny an opportunity to be heard . . . was a denial of Due Process required by the Fifth Amendment. . . . [D]eportation proceedings must conform to requirements of the Fifth Amendment Due Process Clause and . . . these requirements are established by a 'full and fair hearing.' "); *Chike v. INS*, 948 F.2d 961, 962 (5th Cir. 1991) (denial of opportunity to be heard " 'impinged upon the fundamental fairness of the hearing in violation of the fifth amendment.' ") (*quoting Ramirez-Durazo v. INS*, 794 F.2d 491, 500 (9th Cir. 1986)); *Castillo-Manzanarez v. INS*, 65 F.3d 793, 796 (9th Cir. 1995) (failure to receive constitutionally adequate notice of summary dismissal possibility); *Padilla-Agustin v. INS*, 21 F.3d at 978 (inadequate notice of deportation appeal procedures: "due process requires that

aliens who seek to appeal be given a fair opportunity to present their cases."); *Gonzalez-Julio v. INS*, 34 F.3d 820 (9th Cir. 1994) (denial of due process where alien not afforded meaningful opportunity to pursue appeal of deportation order).

In addition to these fundamental due process principles applicable to persons facing possible deportation, this Court also has attached a heavy burden of proof to all allegations of deportability: "We hold that no deportation order may be entered unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true." *Woodby v. INS*, 385 U.S. at 286; *see also Gameros-Hernandez v. INS*, 883 F.2d 839, 841 (9th Cir. 1989) (reversing deportation order for lack of "solidity of proof" mandated by the Supreme Court under *Woodby v. INS*).

Under the established due process and burden of proof standards above, the deportation order issued by the district court in this case, and deportation orders issued within the Eleventh Circuit under 18 U.S.C. § 3583(d) in similar circumstances, do not withstand scrutiny. The Petitioner and other defendants have been ordered deported without adequate notice, without any opportunity to contest alienage and deportability and without any meaningful opportunity to be heard in respect of their deportability, all in plain violation of their due process rights. Moreover, there is no indication that the defendants being sentenced to deportation under this statute are deportable by "clear, unequivocal and convincing evidence," as required. Accordingly, this deportation "condition" of Petitioner's sentence is improper and must be vacated.

3. The INA sets forth the criteria for determining whether a non-United States citizen or alien (a) is subject to deportation or removal from the United States, and (b) if so, whether or not the alien is eligible for relief from deportation. Pursuant to the INA, the Immigration and Naturalization Service ("INS") has promulgated regulations setting forth the specific procedures for adjudicating deportability, determining eligibility for relief from deportation and the grant of such relief. *See, e.g.*, 8 C.F.R. § 242 (1996).

Congress traditionally has provided aliens, through the INA, with protections consistent with their constitutional rights in deportation proceedings. For example, the Attorney General is required, *inter alia*, to ensure that: (a) the alien is provided reasonable notice of the charges against him and the opportunity to inspect or present evidence to rebut those charges, (b) the alien has the privilege of being represented, at the alien's own expense, by counsel of the alien's choosing who is authorized to practice in immigration proceedings,[7] (c) the alien is afforded a reasonable opportunity to inspect the

[7] Courts have held that aliens in deportation proceedings have a Fifth Amendment due process right to access to counsel. *See Montilla v. INS*, 926 F.2d 162, 166 (2d Cir. 1991) ("the Due Process clause . . . affords an alien the right to counsel of his own choice at his own expense"); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554 (9th Cir. 1990) ("aliens have a due process right to obtain counsel of their choice at their own expense"). *See, e.g.*, 8 U.S.C. § 1362 (providing "right to counsel"); *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) (the legislative history of section 1362 of the INA makes clear that Congress "wanted to confer a *right*" to counsel upon aliens in deportation proceedings).

evidence against him and to rebut the charges of deportability,[8] and (d) a record of proceedings is maintained for possible judicial review. *See, e.g.*, 8 U.S.C. § 1252(b).[9] Congress also provided for federal court review of final orders of deportation. 8 U.S.C. § 1105a.

Courts have construed various INA deportation provisions as being consistent with due process. For example, courts have determined that 8 U.S.C. § 1252(b)

> ensures the alien a full measure of due process by first requiring a special inquiry officer to "conduct proceedings *under this section* to determine the deportability of any alien," then by prescribing a procedure full of due process safeguards, and finally by making "[t]he procedure so prescribed the sole and exclusive procedure for determining the deportability of an alien under this section."

United States v. Hernandez, 588 F.2d 346, 351 (2d Cir. 1978) (emphasis in original); *see also Rios-Berrios v. INS*, 776 F.2d at 862 (the INA "directs the Attorney General to adopt

[8] The regulations provide for contested evidentiary hearings, including sworn witness testimony, depositions, third party subpoenas, document discovery, arguments by counsel and agency appeals. *See, e.g.*, 8 C.F.R. §§ 3.3, 3.35.

[9] On September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996). The IIRAIRA modifies certain deportation procedures under the INA. The new legislation does not, nor does it purport to, affect the sentencing statute at issue in this case, 18 U.S.C. § 3583(d). Whether the new restrictions imposed by Congress in the IIRAIRA are consistent with fundamental due process and other protections afforded to aliens is not an issue in this case.

regulations to assure the integrity of the deportation process (e.g. reasonable notice of charges, reasonable opportunity to present and examine evidence, sufficiency of evidence to support deportability, etc.)").

4. The statute at issue in this case does not specifically reference any due process safeguards, nor does it reference any statutory safeguards provided in the INA for the conduct of deportation proceedings. Rather, Congress merely provides that, when an alien is "subject to deportation," the sentencing court may "provide," as a condition of supervised release, that the defendant be deported. 18 U.S.C. § 3583(d). The courts of appeals which have construed section 3583(d) as only allowing district courts to provide for deportation, rather than adjudicating deportability in the first instance and ordering deportations without further proceedings, agree that certain due process safeguards afforded aliens remain applicable in the context of section 3583(d). For example, in *United States v. Ramirez*, 948 F.2d 66, 68 (1st Cir. 1991) (Breyer, J.), the court of appeals held that a section 3583(d) sentencing order must provide for a "proper" deportation hearing "in accordance with the established procedures provided by the Immigration and Naturalization Act." Previously, in *United States v. Sanchez*, 923 F.2d 236 (1st Cir. 1991), the First Circuit held: "In other words, following [the alien's] surrender to Immigration authorities [pursuant to a section 3583(d) sentencing order], he is entitled to whatever process and procedures are prescribed by and under the Immigration and Naturalization Act for one in [the alien's] circumstances, for the purpose of determining whether he is 'an alien defendant . . . subject to deportation.' " 923 F.2d at 237. *See also United*

States v. Xiang, 77 F.3d 771, 773 (4th Cir. 1996) (requiring that section 3583(d) sentencing order provide for deportation "in accordance with established procedures provided by the Immigration and Naturalization Act."); *United States v. Phommachanh*, 91 F.3d 1383 (10th Cir. 1996) (same); *United States v. Quaye*, 57 F.3d 447, 450 (5th Cir. 1995) (refusing to construe section 3583(d) in a manner that would "deprive aliens deported at sentencing of such relief as alien asylum, which the Attorney General may grant."); *United States v. Kassar*, 47 F.3d 562, 568 (2d Cir. 1995) (district judge lacks authority under section 3583(d) to "order" INS to deport alien defendant).[10]

The Eleventh Circuit, however, has only made passing reference to due process considerations in this context. In *United States v. Chukwura*, 5 F.3d 1420, 1424 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 102 (1994), for example, while not expressly requiring the district judge to conduct an "INS type [deportation] hearing," the panel nevertheless found that the district court had conducted a hearing which "met those requirements." Subsequently, however, in *Oboh II*, 92 F.3d at 1087, the court conceded that while aliens facing deportation under a section 3583(d) sentencing order are afforded certain "procedural safeguards," such safeguards do not "afford defendants recourse from deportation equal to that available under the Immigration and Nationality Act."

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[10] While these courts were careful to ensure that deportation is not ordered absent certain procedural safeguards provided in administrative proceedings, they did not undertake a constitutional analysis to determine whether the deportation procedures accorded under the INA satisfy Fifth Amendment due process requirements.

Moreover, the practice approved by the Eleventh Circuit deprives the defendant sentenced to deportation under 18 U.S.C. § 3583(d) of basic due process protections: The defendant need not be given reasonable advance notice of the charges against him, a meaningful opportunity to rebut those charges or an opportunity to apply for relief from deportation. Whatever "due process" the Eleventh Circuit found present under these circumstances, *see United States v. Chukwura, supra,* (which the court did not delineate), the process given was wholly inadequate in terms of constitutional due process.[11]

Given the potentially grave consequences of an erroneous order of deportation, fundamental constitutional

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[11] In 1994, following the 1993 sentencing order at issue in Petitioner's case, Congress enacted a new provision of the INA allowing for "judicial deportation" of aliens under certain circumstances, at the time of a defendant-alien's sentencing in federal district court. *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 224, 108 Stat. 4305 (1994) (codified at 8 U.S.C. § 1252a(d)). Congress mandated specific procedures which must be complied with in order to effectuate such a deportation including: the requirement that the INS Commissioner concur with a United States Attorney's request for judicial deportation, advance (pre-trial) notice to the alien-defendant of such a request, advance notice to the alien of the factual basis for deportability, and a reasonable opportunity for the alien to examine the evidence against him, to present witnesses in his behalf and to cross-examine any government witnesses. 8 U.S.C. § 1252a(d)(2). Congress amended this statute again in the recent IIRAIRA. Since neither the Petitioner nor other defendants sentenced under 18 U.S.C. § 3583(d) were sentenced under this judicial deportation provision, the question of whether that statute affords adequate constitutional due process protections is beyond the scope of this case and the ABA does not address that issue here.

principles preclude the entry of such an order without due process of law. The most basic principles of due process – adequate notice, fair treatment, the opportunity to be heard in a meaningful manner – were not provided to the Petitioner in this case. As a consequence, the deportation sentence imposed under 18 U.S.C. § 3583(d) cannot be upheld.

CONCLUSION

For all of the foregoing reasons, *amicus* American Bar Association requests the Court to reverse the decision of the Eleventh Circuit and direct that the order of deportation be vacated on the ground that it was entered in violation of Petitioner's due process rights.

Respectfully submitted,

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(13)

No. 95-8736

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LARRY OSA OGBOMON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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Amicus Curiae, invited by the Court per Order of October 7, 1996

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QUESTION PRESENTED

Whether 18 U.S.C. § 3583(d) authorizes a district court, when sentencing an alien defendant who is subject to deportation, to require that the defendant be deported.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-8736

LARRY OSA OGBOMON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

STATEMENT

Following a plea of guilty in the United States District Court for the Northern District of Georgia, petitioner was convicted of reentering the United States after having been deported, in violation of 8 U.S.C. § 1326. The district court sentenced him to 16 months' imprisonment, to be followed by a three-year period of supervised release. Pursuant to 18 U.S.C. § 3583(d), the district court ordered that petitioner be deported as a condition of his supervised release. J.A. 9, 12. The court of appeals affirmed. J.A. 15-16.

A. Prior Proceedings

Petitioner, a Nigerian national, was convicted in 1991 of numerous felony offenses involving fraud and forgery.

Presentence Report (PSR) ¶ 4. Later that year, he pleaded guilty in federal court to two counts of bank fraud. He was sentenced to imprisonment, to be followed by a term of supervised release with the special condition that he depart from the United States. PSR ¶ 5. Petitioner was released from prison to the Immigration and Naturalization Service (INS) and, on November 20, 1991, he was deported from the United States. PSR ¶ 6.

B. Proceedings In The District Court

On October 21, 1993, petitioner was found in the United States. J.A. 2; PSR ¶ 8. He was indicted for violating 8 U.S.C. § 1326, which prohibits deported aliens from unlawfully reentering the United States. The indictment alleged that petitioner was "an alien who had been previously arrested and deported from the United States pursuant to law, and who . . . had not received the consent of the Attorney General of the United States to reapply for admission to the United States." J.A. 2. Petitioner ultimately entered a plea of guilty to the indictment. J.A. 1, 10, 15.

In petitioner's presentence report, the probation officer recommended the following condition of supervised release:

> Upon completion of the imprisonment portion of the sentence, the defendant shall be deported from the United States pursuant to 18 U.S.C. 3583(d). [He] shall be delivered to a duly authorized Immigration official for such deportation and shall be detained in the custody of the Immigration and Naturalization Service until deported from the United States.

PSR 10 (Worksheet D). Petitioner did not object to this portion of the presentence report. PSR 12.

At the sentencing hearing, counsel for petitioner reiterated that "we don't have any objections" to the presentence report. J.A. 4. The district court accordingly informed petitioner:

> [O]n completion of the imprisonment portion of your sentence, you shall be deported from the United States pursuant to 18 United States Code, Section 3583(d). You shall take no action to resist an order of deportation. You shall not return to the United States during the period of supervised release. You shall be detained in the custody of the Immigration and Naturalization Service pending your deportation from the United States.

J.A. 9. Counsel for petitioner then "object[ed] to the court's imposition of deportation." *Ibid.*

The judgment entered by the district court committed petitioner to the custody of the Bureau of Prisons for 16 months, to be followed by three years of supervised release. J.A. 11-12. The judgment provided that, as a condition of his supervised release, petitioner "shall depart the United States when ordered to do so by the Immigration and Naturalization Service." J.A. 12. The court further ordered that petitioner "shall take no action to appeal or resist any order [of] deportation by the Immigration and Naturalization Service and if deported, shall not reenter the United States during the term of supervised release." *Ibid.*[1]

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[1] In contrast to the district court's statement on the record at the sentencing hearing, the court's judgment does not expressly order that petitioner be deported. Instead, the judgment can plausibly be read to leave that decision to the INS. Moreover, the INS apparently did not consider itself to be bound by any judicial order of deportation with respect to petitioner. Instead, the INS initiated its own administrative proceedings against petitioner and ultimately ordered his deportation. *See* U.S. Br. 6 & n.4. Accordingly, it could be argued that the question set forth in the petition for a writ of certiorari is not in fact presented on the record in this case. The appeal in this case was litigated on the assumption that the district court did order petitioner's deportation, however, and the court of appeals accepted that assumption. J.A. 15. As a result, it would be appropriate for this Court to resolve the case on that basis. If, however, the Court were to conclude that the district court did not actually order petitioner's deportation, the writ of certiorari should be dismissed as improvidently granted.

C. Proceedings In The Court Of Appeals

Petitioner appealed, arguing "that the district court lacked authority to order his deportation without affording him recourse to the procedures under the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101 *et seq.*" J.A. 15-16.[2] The court of appeals affirmed, relying on *United States* v. *Chukwura*, 5 F.3d 1420 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 102 (1994). In *Chukwura*, the court had held that "[t]he language [of 18 U.S.C. § 3583(d)] is unequivocal and authorizes district courts to order deportation as a condition of supervised release, any time a defendant is subject to deportation." *Id.* at 1423; *see* J.A. 16 (*Chukwura* "held that the district court could order deportation as a condition of supervised release without recourse [to] the procedures for an administrative hearing and judicial review under the INA").[3]

[2] Although petitioner also "argue[d] that the district court erred in failing to make findings of fact regarding his deportability, and failing to consider the possibility of suspension of deportation," the court of appeals declined to consider those arguments because they had not been presented to the district court. J.A. 16 n.1.

[3] In *Chukwura*, the United States argued before the Eleventh Circuit that the district court

> had clear statutory authority under 18 U.S.C. § 3583(d) to order the defendant deported and to serve the period of supervised release outside of the country. The fact that the Immigration and Naturalization Service had jurisdiction to regulate the expulsion of aliens does not preclude the court from exercising its statutory authority to order the deportation as a term of supervised release.

Brief for Appellee in *United States* v. *Chukwura*, No. 92-8737, at 6. After the court of appeals agreed with the Government's submission, the defendant petitioned for a writ of certiorari. The Solicitor General reexamined the position of the United States and concluded that Section 3583(d) should not be read to authorize district courts to order the deportation of alien defendants. Brief for the United States in *Chukwura* v. *United States*, No. 93-8962 (U.S. *Chukwura* Br.), at 9. In petitioner's case, the Government informed the court of appeals of its change in position, but the panel concluded that it

D. Subsequent Proceedings

After petitioner's release from prison he was arrested pursuant to a warrant of deportation, although he was not deported. U.S. Br. 6 & n.4. Petitioner was subsequently arrested in the Northern District of Alabama and indicted "on a variety of federal charges." U.S. Br. 7 n.5. He pleaded guilty to all counts and was sentenced to 24 months of imprisonment, to be followed by five years of supervised release. *Ibid.* The sentencing court ordered, as a condition of petitioner's supervised release, that he " 'shall be deported immediately upon completion of the term of imprisonment and shall remain outside the United States during the period of supervised release, in accordance with 18 U.S.C. 3583(d) and with [*Chukwura*].' " *Ibid.* (quoting *United States* v. *Ogbomon*, No. CR 96-PT-124-NE (N.D. Ala. Aug. 29, 1996), at 3)).[4]

was bound by the prior decision in *Chukwura* and the full court declined to rehear the case en banc. J.A. 16, 17-18.

[4] As a result of petitioner's arrest in Alabama, the Georgia district court entered an order revoking petitioner's supervised release and requiring him to serve 12 months in prison. U.S. Br. 6. As the Government notes, this order raises a question of mootness. *Ibid.* Although petitioner is not subject to any further term of supervised release for his Georgia conviction (*see* 18 U.S.C. § 3583(h)), the subsequent order of deportation in the Alabama action may demonstrate that "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again" and, therefore, that the sentencing term of which petitioner complains is "capable of repetition, yet evading review." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam). In the alternative, the Court presumably could avoid any question of mootness by granting either or both of the pending petitions in *Oboh* v. *United States*, No. 96-6653, and *Bowen* v. *United States*, No. 96-6658, which present the same issue as this case, and consolidating them with the instant petition. *Cf. Rogers* v. *Paul*, 382 U.S. 198, 199 (1965) (per curiam) (adding petitioners to avoid the possibility of mootness). If the Court ultimately concludes that this case is moot, the petition for a writ of certiorari should be dismissed. This would not be an appropriate case for vacatur of the judgment below pursuant to *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950),

Meanwhile, petitioner sought review in this Court of the decision affirming his Alabama sentence, arguing that the court of appeals' reliance on *Chukwura* reflected a conflict among the Circuits on the proper interpretation of 18 U.S.C. § 3583(d). While the petition was pending, the en banc Eleventh Circuit "interpret[ed] section 3583(d) in accordance with its plain language and reaffirm[ed] *Chukwura*'s holding that section 3583(d) authorizes district courts to deport defendants 'subject to deportation' as a condition of supervised release." *United States* v. *Oboh*, 92 F.3d 1082, 1087 (11th Cir. 1996) (en banc) (*Oboh II*), *cert. pending*, Nos. 96-6653 & 96-6658 (filed Nov. 6, 1996). The *Oboh II* court acknowledged that its holding conflicted with decisions of other courts interpreting 18 U.S.C. § 3583(d). *See id.* at 1083 (citing conflicting decisions in *United States* v. *Xiang*, 77 F.3d 771 (4th Cir. 1996), *United States* v. *Quaye*, 57 F.3d 447 (5th Cir. 1995), and *United States* v. *Sanchez*, 923 F.2d 236 (1st Cir. 1991)).

SUMMARY OF ARGUMENT

A. The last sentence of 18 U.S.C. § 3583(d) authorizes federal district courts, when sentencing an alien defendant who is subject to deportation, to "provide, as a condition of supervised release, that he be deported." As the court of appeals correctly concluded, this language unambiguously grants district courts the power to require the deportation of an alien defendant who is sentenced to a term of supervised release.

1. Contrary to the arguments of petitioner and the Solicitor General, Congress's use of the verb "provide" rather than "order" in the last sentence of Section 3583(d)

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because any mootness is attributable to petitioner's own actions. *See U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 390-393 (1994). Petitioner's misconduct in committing additional crimes while on supervised release disentitles him to the equitable remedy of vacatur. *Id.* at 391-392.

does not detract from the district court's authority to require deportation. Petitioner and the Solicitor General rely on a grammatically inapposite definition of the word "provide," and they ignore the fact that the statute governing the conditions of probation—which is incorporated by reference in Section 3583(d)—uses "provide" to mean "order" or "require." The power to "provide . . . that [an alien defendant] be deported" is unquestionably the power to require the defendant's deportation.

2. Section 3583(d) requires district courts to look to the substantive standards set forth in the Immigration and Nationality Act (INA) in determining whether a particular defendant is an "alien" who is "subject to deportation." Section 3583(d) does not, however, incorporate by reference the various administrative procedures and avenues of relief applicable in INS proceedings. Petitioner's argument that only the INS can determine whether an alien is "subject to deportation" is incorrect under any reading of the statute, because Section 3583(d) expressly requires that determination to be made as a threshold matter by the district court before the court decides whether to exercise its discretion regarding deportation as a condition of supervised release.

3. The court of appeals' construction of Section 3583(d) is entirely consistent with the INA. Title 8 U.S.C. § 1103(a) grants the Attorney General authority over immigration matters generally. Under traditional rules of statutory construction, however, that general provision does not override Section 3583(d)'s specific grant of deportation authority to the district courts. And while 8 U.S.C. § 1252(b) establishes the "sole and exclusive procedure for determining the deportability of an alien *under this section*" (emphasis added), it does not purport to affect the separate authority of district courts under Section 3583(d).

4. Petitioner and the Solicitor General contend that the last sentence of Section 3583(d) merely authorizes

sentencing courts to order the surrender of alien defendants to the INS in order to facilitate a potential INS order of deportation. That interpretation should be rejected, however, because it would render the relevant statutory text without operative effect. Indeed, Congress provided in a separate provision (8 U.S.C. § 1252(h)) that supervised release would not stand as an obstacle to administrative deportation of aliens, and nothing in federal sentencing law would hinder the administrative deportation of defendants on supervised release even if the last sentence of Section 3583(d) had never been enacted.

B. The non-textual arguments advanced by petitioner and the Solicitor General in opposition to the plain-language interpretation of Section 3583(d) are unavailing.

1. The court of appeals' construction of Section 3583(d) is consistent with the history of congressional legislation in the immigration area. Congress has previously granted the federal courts a significant role in making deportation determinations. In the latter part of the 19th century and well into this century, for example, congressional legislation expressly vested in the federal courts the authority to determine whether certain aliens would be deported. For most of this century, moreover, federal sentencing courts possessed the power to issue a judicial recommendation against deportation that precluded the INS from using a particular conviction as a basis for deportation. Thus, there is nothing anomalous about construing Section 3583(d) in accordance with its plain language to grant limited deportation authority to federal sentencing courts.

2. The procedural protections applicable to sentencing proceedings (including determinations under Section 3583(d)) are not significantly different from those available in INS deportation hearings. Petitioner is therefore incorrect in arguing that Congress's failure to incorporate

specific procedures into Section 3583(d) reveals a legislative purpose not to grant deportation authority to sentencing courts.

3. There is no merit to petitioner's and the Solicitor General's reliance on former 18 U.S.C. § 4212 (1976), which they describe as a predecessor to Section 3583(d). That prior statute, which authorized parole boards to release defendants to the INS for administrative deportation, was enacted in order to override preexisting restrictions on the parole board's ability to release parolees who would not be remaining within the jurisdiction of the sentencing court. No such restrictions apply to a district court's authority to impose supervised release, so a statute analogous to 18 U.S.C. § 4212 was unnecessary once Congress abolished parole. Moreover, the textual differences between former 18 U.S.C. § 4212 and Section 3583(d) provide further confirmation that the latter statute (unlike the former) is a grant of deportation authority.

4. The various amendments to the immigration laws enacted after the adoption of Section 3583(d) do not undermine the court of appeals' plain-language interpretation of that provision. The addition of a judicial deportation provision to the INA in 1994 is entirely consistent with Section 3583(d). Section 3583(d) is purely a sentencing provision vesting discretionary authority in the federal courts; the 1994 amendment, by contrast, grants discretion to the Executive to determine whether to seek judicial deportation, and thereby provides the Attorney General with an efficient alternative to the commencement of administrative deportation proceedings against criminal aliens. Likewise, there is no conflict between Section 3583(d) and Congress's recent decision to authorize federal courts to impose deportation as a condition of probation in certain circumstances; probation and supervised release are mutually exclusive sentences.

More fundamentally, petitioner and the Solicitor General err in relying on legislation that post-dates the enactment of Section 3583(d). As this Court has repeatedly recognized, such *post hoc* legislative "history" is a highly dubious basis for construing a previously adopted statute.

ARGUMENT

TITLE 18 U.S.C. § 3583(d) AUTHORIZES DISTRICT COURTS TO REQUIRE THE DEPORTATION OF ALIEN DEFENDANTS AS A CONDITION OF SUPERVISED RELEASE

The district court relied on 18 U.S.C. § 3583(d) as authority for requiring that petitioner be deported as a condition of his supervised release. J.A. 9.[6] That statute reads, in relevant part:

> If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

18 U.S.C. § 3583(d). This language is clear and unambiguous. It allows a district court, when sentencing an alien defendant who is subject to deportation, to require that he be deported and to order him delivered to the INS for such deportation. The contrary arguments advanced by petitioner, his *amici*, and the Solicitor General cast no doubt on the plain meaning of Section 3583(d).

[6] This case involves the interplay between Section 3583(d) and the immigration laws, which Congress has amended repeatedly in recent years. *See* U.S. Br. 2 n.1. Unless otherwise noted, this brief will refer to the statutes in effect when the district court entered judgment (United States Code, 1988 ed. & Supp. V) and will use the terminology that governed the proceedings below.

A. The Plain Language Of Section 3583(d) Allows District Courts To Require That Alien Defendants Be Deported

In the Sentencing Reform Act of 1984, Congress abolished parole and established a new form of post-imprisonment supervision known as supervised release. Pub. L. No. 98-473, tit. II, ch. II, §§ 212(a)(2), 218(a)(5), 235, 98 Stat. 1987, 1999, 2027, 2031; *see* 18 U.S.C. § 3583(a). "Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court." U.S.S.G. Ch. 7, Pt. A, intro. comment. District courts may impose a variety of conditions on the defendant in connection with a term of supervised release. 18 U.S.C. § 3583(d); *see* U.S.S.G. § 5B1.4 (policy statement) (listing standard conditions of supervised release).

Some of the conditions of supervised release specified in Section 3583(d) are mandatory. For example, the court must order the defendant not to commit any crimes and to refrain from using unlawful drugs. In addition, the district court may impose, with certain exceptions, any condition set forth as a discretionary condition of probation in 18 U.S.C. § 3563(b). Finally, in the case of an alien defendant who is subject to deportation, the district court "may provide, as a condition of supervised release, that he be deported and remain outside the United States," and the court "may order that he be delivered to a duly authorized immigration official for such deportation."

1. *The Statutory Authorization To "Provide" That Alien Defendants Be Deported Allows District Courts To Require Deportation*

"[I]n all cases involving statutory construction [the] starting point must be the language employed by Congress." *INS* v. *Phinpathya*, 464 U.S. 183, 189 (1984) (internal quotations omitted). Section 3583(d) author-

izes district courts to "provide, as a condition of his supervised release, that [an alien defendant] be deported and remain outside the United States." This language is unambiguous: Under Section 3583(d), a district court may require the deportation of an alien defendant as a condition of supervised release. *See Oboh II*, 92 F.3d at 1084 ("We find this language clear and unequivocal."); *Chukwura*, 5 F.3d at 1423 ("The language is unequivocal and authorizes district courts to order deportation as a condition of supervised release").[6]

Despite the obvious import of the statutory text, petitioner and the Solicitor General argue that it does not grant district courts any authority to require deportation. Pet. Br. 13-16; U.S. Br. 16-17. They point out that other portions of Section 3583(d) permit courts to "order" particular conditions of supervised release, whereas the relevant passage permits courts to "provide" that an alien defendant be deported. Thus, they reason, "the court's authority for deportation stands alone in a separate sentence as the only condition for which the court's authority is merely to 'provide.' " Pet. Br. 15; *see also* U.S. Br. 16. In their view, "[t]he congressional choice between the words 'provide' or 'order' decisively shows that § 3583(d) does not grant district courts the jurisdiction to deport aliens." Pet. Br. 13. This argument is without merit.

In the first place, petitioner and the Solicitor General rely on the wrong definition of the word "provide" to support their textual argument. Petitioner asserts that the verb "provide" means to " 'exercise foresight in taking

[6] Indeed, the Solicitor General has previously conceded that "[s]tanding alone, the language stating that 'the court may provide . . . that [the defendant] be deported and remain outside the United States' lends support to the Eleventh Circuit's holding that Section 3583(d) authorizes a district court to enter a judicial order of deportation, without any occasion for recourse to the procedures established by the INA for deporting aliens." U.S. *Chukwura* Br. 10.

due measures in view of a possible event.' " Pet. Br. 16 (quoting 12 *Oxford English Dictionary* 713 (2d ed. 1989)); *see also* U.S. Br. 16-17. As the dictionary on which petitioner relies makes clear, however, when used in this preparatory or precautionary sense the verb "provide" always takes the construction "for" or "against." *See* 12 *Oxford English Dictionary* 713 (2d ed. 1989); *see also Webster's Third New International Dictionary* 1827 (1976) ("to take precautionary measures: make provision—used with *against* or *for*"); *cf.* U.S. Const., preamble ("provide for the common defence"). Petitioner and the Solicitor General tacitly concede as much by repeatedly asserting that Section 3583(d) authorizes the district court to provide *for* an alien's deportation. *See* Pet. Br. 5, 8, 12, 16, 20, 21; U.S. Br. 1[illegible], 19.

Congress, however, did not authorize district courts merely to provide "for" the deportation of an alien defendant; rather, Section 3583(d) allows the court to "provide, as a condition of supervised release, *that* he be deported" (emphasis added). Such a condition allows a district court to *require* an alien defendant's deportation, not merely to prepare for the possibility of deportation by the INS. *See Oboh II*, 92 F.3d at 1084 ("The language states that a sentencing court may require that a defendant 'subject to deportation' be deported as a condition of supervised release").

As used in this context, the verb "provide" means "to make a proviso or stipulation." *Webster's Third New International Dictionary* 1827 (1976); *see also Webster's New International Dictionary* 1994 (2d ed. 1946) ("to stipulate; as, the contract provides that the work be well done"); 12 *Oxford English Dictionary* 713 (2d ed. 1989) ("To make it, or lay it down as, a provision or arrangement; to stipulate *that*"). Congress frequently uses the term in this sense, as has this Court in its rulemaking capacity. *See, e.g.*, 7 U.S.C. § 2305(a); 28 U.S.C. §§ 157(a), 654(b); 39 U.S.C. § 3007(a); Fed. R. Crim.

P. 56; Fed. R. Civ. P. 77(c); Fed. R. App. P. 45. Thus, a statutory grant of authority to "provide . . . that" a defendant be deported as a condition of supervised release is an authorization to impose deportation as a mandatory and binding obligation.

The context in which "provide" appears in the statute further demonstrates that Congress used the verb in its mandatory sense. Immediately preceding the grant of authority to "provide" that alien defendants be deported, Section 3583(d) authorizes the court to impose, as a discretionary condition of supervised release, "any condition set forth as a discretionary condition of probation in [18 U.S.C.] section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20)." The referenced probation statute states in turn that the court may "provide" that the defendant be subjected to a variety of restrictions. 18 U.S.C. § 3563(b). For example, "[t]he court may provide . . . that the defendant . . . reside in a specified place or area, or refrain from residing in a specified place or area." 18 U.S.C. § 3563(b)(14). Congress used a similar construction in detailing the mandatory conditions of probation. *See, e.g.*, 18 U.S.C. § 3563(a)(1) ("The court shall *provide*, as an explicit condition of a sentence of probation . . . that the defendant not commit another Federal, State, or local crime") (emphasis added). It is indisputable that the court's power to "provide" that a defendant comply with the terms of his probation comprehends the imposition of mandatory requirements, not mere precatory suggestions.

Thus, when Section 3583(d) is read in conjunction with 18 U.S.C. § 3563, which was also enacted as part of the Sentencing Reform Act of 1984 and is incorporated by reference in Section 3583(d), it is apparent that Congress used "provide . . . that" to mean "require" (or, equivalently, "order"). *See Gustafson* v. *Alloyd Co.*, 115 S. Ct. 1061, 1067 (1995) ("the 'normal rule of statutory construction [is] that 'identical words used in different parts of the same act are intended to have the same meaning' "); *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) ("identical terms within an Act bear the same meaning"). Giving the same meaning to identical statutory terms is particularly appropriate where, as here, the separate statutory uses of the same term are interrelated and proximate. *C.I.R.* v. *Lundy*, 116 S. Ct. 647, 655 (1996). Section 3583(d), accordingly, must be construed to authorize district courts to require that alien defendants be deported.

2. *District Courts May Require That Alien Defendants Be Deported Without Recourse To Administrative Proceedings*

Before requiring that a defendant be deported as a condition of supervised release, the district court must determine whether the defendant is an "alien" who is "subject to deportation." The INA contains a definition of "alien" and specifies which aliens are "deportable." 8 U.S.C. §§ 1101(a)(3) & 1251(a).[7] A fair reading

[7] An alien is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). Aliens subject to deportation include those who are in the country unlawfully and those who have been convicted of crimes involving moral turpitude, controlled substance or firearms offenses, or defined aggravated felonies. *See* 8 U.S.C. § 1251(a). As noted above (at 4 n.2), petitioner did not dispute his status as a deportable alien in the district court, and he has therefore waived any argument to that effect. *See also* J.A. 16 n.1. In any event, there is no question but that these statutory preconditions are satisfied in this case. Petitioner's status as an alien was a substantive element of his offense of conviction. 8 U.S.C. § 1326. The indictment to which petitioner pleaded guilty charged him with being an alien (*see* J.A. 2), and the district court's acceptance of the plea indicates that the court was satisfied that there was a factual basis therefor. *See* Fed. R. Crim. P. 11(f). Moreover, petitioner's crime of unlawfully reentering the United States after having been deported plainly rendered him deportable. 8 U.S.C. § 1251(a)(1)(B) ("[a]ny alien who . . . is in the United States in violation of this chapter or any other law of the United States is deportable"). Thus, petitioner indisputably is an "alien" who is "subject to deportation."

of Section 3583(d) therefore indicates that a district court should refer to the INA in determining whether a defendant is an alien subject to deportation (or, equivalently, deportable). *Cf. Molzof* v. *United States*, 502 U.S. 301, 307 (1992) (" '[w]here Congress borrows terms of art in which are cumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed' ").

The Solicitor General apparently does not agree that "deportable" and "subject to deportation" mean the same thing. Instead, he contends that "[c]lassification as a deportable alien does not subject an alien to deportation" under the INA because there are various avenues for seeking administrative relief from deportation. U.S. Br. 26-27. But a judicial determination that an alien defendant is "subject to deportation" does not necessarily "subject an alien to deportation" under Section 3583(d) either; the Solicitor General's argument rests on a transformation of the adjective "subject" into a verb that has a different connotation.[8] The statutory terms "deportable" and "subject to deportation" plainly carry the same meaning (*see Webster's Third New International Dictionary* 605 (1976) (defining "deportable" as "subject to deportation")), and describe an alien who meets the threshold eligibility requirements for potential removal from this country. Indeed, the INA itself uses the two terms interchangeably. *See* 8 U.S.C. §§ 1251(a), 1251(b), 1252(i).

[8] The relevant statutory phrase in Section 3583(d)—"is subject to deportation"—uses the word "subject" in its adjectival form to mean "suffering a particular liability or exposure." *Webster's Third New International Dictionary* 2275 (1976). The Solicitor General's formulation—"subject an alien to deportation"—uses the word "subject" as a verb to mean "to cause to undergo or submit to." *Ibid.* Obviously, these different forms of the word have different meanings.

Petitioner argues that "[t]he meaning of 'subject to deportation' is not intrinsically apparent but rather requires reference to 8 U.S.C. § 1251 and § 1252(b), which define 'deportable aliens' *and* the 'proceedings to determine deportability.' " Pet. Br. 16 (emphasis added). But the fact that Section 3583(d) essentially incorporates by reference the INA's definitions of "alien" and "deportable" does not somehow transform Article III judges into INS hearing officers subject to all of the procedures applicable to administrative deportation proceedings. Alienage and deportability are status characteristics; either a defendant is an alien who is subject to deportation, or he is not. Congress has recognized that both determinations can be made *before* any administrative proceedings are initiated. *See* 8 U.S.C. § 1252(i) ("In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of the conviction").

Section 3583(d) on its face vests the determination whether an alien defendant should be deported in the district courts, without recourse to the procedures established for administrative deportations under the INA. In fact, without an initial *judicial* determination that the defendant is "subject to deportation," the court has no way of knowing whether the last sentence of Section 3583(d) —however construed—is even applicable. *See* 18 U.S.C. § 3583(d) ("*If* an alien defendant is subject to deportation, the court may provide . . . that he be deported . . . and may order that he be delivered to [the INS]") (emphasis added). The structure of the statute thus demonstrates the flaw in petitioner's argument that the determination whether an alien is "subject to deportation" is "a finding that must be made by the INS." Pet. Br. 7; *see* U.S. Br. 26-27. Indeed, the argument that the statute leaves deportability determinations for the INS is entirely circular. *See, e.g., Sanchez*, 923 F.2d at 237 ("subsection 3583(d) simply permits the sentencing court to order

. . . that 'an alien defendant [who] is subject to deportation' be surrendered to immigration officials . . . for the purpose of determining whether he is 'an alien defendant . . . subject to deportation' "); Pet. Br. 23 (relying on this passage from *Sanchez*); U.S. Br. 30 (same).

The final clause of the operative sentence of Section 3583(d) provides further confirmation that no administrative proceedings are required before an alien defendant is deported. If the district court requires, as a condition of supervised release, that an alien defendant be deported, the court may also order that the defendant be delivered to the INS "for *such* deportation" (emphasis added)—*i.e.*, the deportation imposed by the court as a condition of supervised release. Congress's use of the word "such," which petitioner omits from his quotation of the statute (Pet. Br. 13), demonstrates that the judicial order of deportation is sufficient to require INS officials to carry out the ministerial act of removing the defendant from the country. No further administrative proceedings are necessary.

3. *Section 3583(d) Does Not Conflict With The Immigration And Nationality Act*

Petitioner argues that, if Section 3583(d) is construed in accordance with its plain language to authorize judicial orders of deportation, it cannot be read *in pari materia* with the INA because "significant portions of 8 U.S.C. §§ 1103(a), 1251, and 1252 are rendered meaningless." Pet. Br. 22; *see* U.S. Br. 25. This argument is incorrect.

Title 8 U.S.C. § 1103(a) states that "[t]he Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens." This is a broad and general grant of authority to the Attorney General. Title 18 U.S.C. § 3583(d), by contrast, is a narrowly drawn provision that authorizes district courts, in defined circumstances, to require that alien defendants

be deported as a condition of supervised release. Under the well-established maxim that a specific provision prevails over a more general one (*e.g.*, *Simpson* v. *United States*, 435 U.S. 6, 15 (1978); *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932)), the general delegation of authority to the Attorney General does not override the specific authority granted to district courts. *Cf. Castaneda-Gonzalez* v. *INS*, 564 F.2d 417, 423 (D.C. Cir. 1977) (concluding that general grant of authority to Attorney General does not subsume the power to determine the validity of labor certificates, which Congress delegated in the INA to the Secretary of Labor).

Title 8 U.S.C. § 1251 provides that "[a]ny alien . . . in the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens." Section 1251 clearly confers on the Attorney General the authority to determine whether an alien is deportable and to order him deported. It says nothing, however, about whether a court can make a similar determination and order—the authority granted in Section 3583(d). Likewise, 8 U.S.C. § 1252(b), which sets forth "the sole and exclusive procedure for determining the deportability of an alien *under this section*" (emphasis added), is inapposite because the district court in this case did not proceed under Section 1252(b).[9]

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[9] A recently enacted revision of the INA's deportation procedures states that "[u]nless otherwise specified *in this Act*, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009 (1996), *reproduced at* 138 Cong. Rec. H11798 (daily ed. Sept. 28, 1996), to be codified at 8 U.S.C. § 1230(a)(3) (emphasis added). This provision is effective April 1, 1997. *See* IIRAIRA § 309, *reproduced at* 138 Cong. Rec. H11808 (daily ed. Sept. 28, 1996). Athough "repeals by implication are not favored" (*Rodriguez* v. *United States*, 480 U.S. 522, 524 (1987)), it could be argued that

4. *The Interpretation Of Section 3583(d) Urged By Petitioner And The Solicitor General Would Deprive The Relevant Statutory Language Of Operative Effect*

Petitioner argues that a sentencing court "is only authorized by Congress to 'provide' for the alien's deportation at the conclusion of his custodial sentence by 'order-[ing]' his surrender to immigration officials." Pet. Br. 20-21. Similarly, the Solicitor General contends that the final sentence of Section 3583(d) merely permits a court to "provide for deportation of an alien defendant by the Attorney General" and thereby ensure that "supervised release would not stand as an obstacle to deportation." U.S. Br. 19; *see id.* at 17-23. But construing Section 3583(d) to do nothing more than authorize the court to order the delivery of an alien defendant to the INS for potential deportation would violate "the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States* v. *Nordic Village Inc.*, 503 U.S. 30, 36 (1992).

Section 3583(d) states that the court "may provide . . . that [the defendant] be deported . . . *and* may order that he be delivered to a duly authorized immigration official for such deportation" (emphasis added). The construction urged by petitioner and the Solicitor General would be accomplished by the second clause alone; Congress's use of the conjunctive, however, indicates that the two clauses have independent significance. Because the latter clearly authorizes the court to order the alien delivered to the INS for deportation, the former must mean (as it says) that the court can also require his deportation.

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this provision eliminates the authority of district courts to order deportation under Section 3583(d) after April 1, 1997, because Section 3583(d) is not specifically referenced in the INA (as amended by IIRAIRA). Thus, the question presented in this case may lack any continuing importance after IIRAIRA becomes effective. *Cf. Rice* v. *Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70, 77 (1955) (dismissing writ of certiorari as improvidently granted in light of newly enacted statute).

Contrary to the arguments advanced by the Solicitor General, moreover, the last sentence of Section 3583(d) was not necessary merely to ensure that supervised release did not stand as a potential "obstacle" to deportation. Congress expressly eliminated that concern by amending the INA to provide that "supervised release . . . shall not be a ground for deferral of deportation." 8 U.S.C. § 1252(h), as amended by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, § 220(b), 98 Stat. 1987, 2028. Indeed, if the Solicitor General's argument were valid, supervised release would pose an obstacle to administrative deportation of criminal aliens in all cases where district courts choose not to issue deportation orders under Section 3583(d). The relevant statutory provisions cannot plausibly be read in that fashion.[10]

The Solicitor General's related contention that Section 3583(d) merely "preserves the established authority of the Attorney General to effect the deportation of an alien and provides for carrying out such an order *without violating the statutory terms of supervised release*" (U.S. Br. 22 (emphasis added)) is equally unfounded. The

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[10] Indeed, wholly apart from the last sentence of Section 3583(d), district courts and the INS have ample authority to ensure that alien criminals are turned over to the INS for possible administrative deportation after they have served their terms of imprisonment. The penultimate sentence of Section 3583(d) empowers a district court to impose as a condition of supervised release "any other condition it considers to be appropriate." In determining conditions it considers to be appropriate, the district court enjoys broad discretion (*e.g.*, *United States* v. *Phaneuf*, 91 F.3d 255, 262-263 (1st Cir. 1996); *United States* v. *Showalter*, 933 F.2d 573, 574 (7th Cir. 1991)), and plainly could direct a deportable alien defendant to report to the INS as a condition of supervised release. *Cf. United States* v. *Polchlopek*, 897 F.2d 997 (9th Cir.) (per curiam) (upholding condition that defendant travel to Canada and appear in court), *cert. denied*, 498 U.S. 828 (1990). Alternatively, the INS could arrest and detain such a defendant on its own authority pending deportation (8 U.S.C. § 1357(a); 8 C.F.R. § 242.2), or could issue and lodge a detainer directing the appropriate criminal justice agency to maintain custody of the defendant for a period of time pending the INS's assumption of custody. 8 C.F.R. § 242.2.

Solicitor General does not identify any mandatory term of supervised release that would be violated if the INS were to institute administrative deportation proceedings and deport an alien defendant on supervised release, and there is none.[11]

The Solicitor General also errs in contending that Section 3583(d) was necessary to avoid the risk that "[d]eportation . . . would make it impossible for a probation officer to fulfill various statutory duties of supervision." U.S. Br. 18. The statute provides that a defendant on supervised release "shall, during the term imposed, be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court." 18 U.S.C. § 3601. If the defendant were deported, no supervision would be "warranted." Moreover, the Solicitor General's arguments would be equally applicable to Congress's recent decision to authorize sentencing courts to impose deportation as a condition of *probation* (*see infra* at 23 n.13, 38-39), yet this provision clearly grants deportation authority to the district courts as well.[12]

[11] The Solicitor General points to "conditions such as reporting, in person, to a probation officer or having a probation officer visit the supervisee's home or workplace" as inconsistent with deportation. U.S. Br. 18. But these are merely discretionary conditions of probation or supervised release under the Sentencing Reform Act, and thus district courts possess plenary authority to eliminate or make exceptions to these conditions without recourse to the last sentence of Section 3583(d).

[12] The Solicitor General also argues that the last sentence of Section 3583(d) serves the purpose of "establishing an efficient means of reimprisoning an alien defendant who reenters the United States" without the need to bring "a new and independent criminal prosecution" for illegal reentry under 8 U.S.C. § 1326. U.S. Br. 23 n.11. Congress had no need to enact the deportation provision of Section 3583(d), however, if this were all it sought to achieve. It is a mandatory condition of supervised release that the defendant "not commit another Federal . . . crime" (18 U.S.C. § 3583(d)), and district courts may revoke supervised release on that ground regardless of whether a separate criminal prosecution is brought. U.S.S.G. § 7B1.1, comment. (note 1); 18 U.S.C. § 3583(e)(3). Thus, wholly apart from the last sentence of Section 3583(d), district courts are authorized to reimprison alien defendants who reenter the United States in violation of 8 U.S.C. § 1326 during their term of supervised release, and no independent criminal prosecution is required.

In short, the statutory interpretation proposed by petitioner and the Solicitor General would render the relevant language of Section 3583(d) entirely superfluous and unnecessary. That interpretation should therefore be rejected, because "th[is] Court will avoid a reading which renders some words altogether redundant." *Gustafson* v. *Alloyd Co.*, 115 S. Ct. 1061, 1069 (1995).[13]

B. The Non-Textual Arguments Advanced By Petitioner And The Solicitor General Do Not Alter The Plain Meaning Of Section 3583(d)

As demonstrated above, the plain language of Section 3583(d) authorizes district courts to order the deporta-

[13] The Solicitor General suggests (U.S. Br. 20 n.9) that Section 3583(d) should not be construed to authorize judicial orders of deportation because the only judicial means of enforcing such orders would be revocation or modification of the defendant's supervised release. Congress was certainly entitled to assume, however, that the INS would enforce judgments of conviction imposing deportation as a condition of supervised release if the sentencing court chose to "order that [the defendant] be delivered to a duly authorized immigration official for such deportation." 18 U.S.C. § 3583(d); *see Dunlop* v. *Bachowski*, 421 U.S. 560, 575-576 (1975) (adopting assumption that the Executive "would proceed appropriately without the coercion of a court order" once court had ruled), *overruled in part on other grounds, Local No. 82, Furniture Moving Drivers* v. *Crowley*, 467 U.S. 526, 549-50 n.22 (1984). Indeed, Congress recently chose precisely the same mechanism for authorizing deportation of defendants sentenced to probation (IIRAIRA § 374(b)(3), *reproduced at* 138 Cong. Rec. H11814 (daily ed. Sept. 28, 1996), to be codified at 18 U.S.C. § 3563(b)(21)), and the Solicitor General concedes (U.S. Br. 38) that that provision vests district courts with authority to ensure that their deportation orders are carried out. In any event, federal courts are not without power to enforce judicially imposed conditions. *See, e.g.*, 28 U.S.C. § 566(a) ("It is the primary role and mission of the United States Marshals Service . . . to obey, execute, and enforce all orders of the United States District Courts"); 28 U.S.C. § 1651(a).

tion of alien defendants as a condition of supervised release, without recourse to the procedures established by the INA. Nothing in the traditional allocation of deportation authority, the history of Section 3583(d), or subsequent legislation alters this conclusion.

1. *Section 3583(d) Does Not Upset The Traditional Allocation Of Deportation Authority*

Petitioner argues that Section 3583(d) should not be interpreted to "divest the Executive Branch of nearly two centuries of plenary authority to decide what to do with a particular alien." Pet. Br. 16; *see also* U.S. Br. 30-31. On the contrary, Section 3583(d) is only one of a number of statutes whereby Congress has granted authority to the district courts to make deportability determinations.

The Constitution grants Congress plenary power over immigration and naturalization matters. U.S. Const., art. I, § 8, cl. 4; *see, e.g., United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 864 (1982); *Galvan* v. *Press*, 347 U.S. 522, 530-531 (1954). Congress has expressly recognized that nationality is a suitable subject for judicial inquiry. 8 U.S.C. § 1105a(a)(5) (providing for judicial resolution of whether a person subject to an administrative deportation order is a national of the United States); *see also Quock Ting* v. *United States*, 140 U.S. 417 (1891) (reviewing citizenship determination on habeas corpus). Indeed, this Court has held that an American resident resisting deportation on the ground of nationality is constitutionally entitled to a judicial determination of the question of alienage, relying in part on "[t]he difference in security of judicial over administrative action" in immigration matters. *Ng Fung Ho* v. *White*, 259 U.S. 276, 285 (1922). Moreover, it is clear that Congress can constitutionally delegate deportation authority to the courts. *See, e.g., Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893); *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892).

Although Congress granted the President the authority to expel aliens in 1798, that statute expired in 1800 and Congress passed no further legislation on the subject until 1875. Auerbach, *Immigration Laws of the United States* 3 (2d ed. 1961). Just a few years later, Congress passed the Chinese Exclusion Acts, which expressly vested the decision whether to deport aliens in the district courts. *See* Act of May 6, 1882, ch. 1226, § 12, 22 Stat. 61, as amended by Act of July 5, 1884, ch. 220, § 12, 23 Stat. 117-118; *United States* v. *Jung Ah Lung*, 124 U.S. 621 (1888) (discussing the role of the judiciary under this statute). Congress amended the Chinese Exclusion Acts a number of times, consistently retaining a scheme of judicial deportation. *See, e.g.*, Act of May 5, 1892, ch. 60, § 6, 27 Stat. 25-26 ("any Chinese laborer . . . who shall neglect, fail or refuse to comply with the provisions of this act, . . . [may be] taken before a United States judge, *whose duty it shall be to order that he be deported from the United States* [unless certain conditions are met]") (emphasis added).[14] As this Court explained, "[d]eportation under provisions of the Chinese Exclusion Acts can be had only upon judicial proceedings." *Ng Fung Ho*, 259 U.S. at 279; *see also Fong Yue Ting*, 149 U.S. at 728-729. Thus, it is hardly unprecedented for Congress to vest in the federal courts the power to determine whether certain aliens shall be deported.[15]

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[14] *See also* Act of Sept. 13, 1888, ch. 1015, § 13, 25 Stat. 479; Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504; Act of May 5, 1892, ch. 60, §§ 2, 6, 27 Stat. 25-26; Act of Nov. 3, 1893, ch. 14, § 6, 28 Stat. 7; Act of Aug. 18, 1894, ch. 301, 28 Stat. 390; Act of Mar. 3, 1901, ch. 845, 31 Stat. 1093; Act of Apr. 29, 1902, ch. 641, 32 Stat. 176; Act of Apr. 27, 1904, ch. 1630, § 5, 33 Stat. 394, 428.

[15] Nor has Congress always chosen to give the Executive Branch sole authority to initiate deportation proceedings. The 1884 legislation granted "all peace officers of the several States and Territories" authority to bring suspected aliens "before some justice, judge, or commissioner of a court of the United States" for removal proceedings. Act of July 5, 1884, ch. 220, § 12, 23 Stat. 118.

In the General Immigration Act of 1917, Congress for the first time enacted legislation to provide for the deportation of aliens convicted of crimes committed after entry into the United States. Hutchinson, *Legislative History of American Immigration Policy 1798-1965* 451 (1981). While Congress allocated to the Executive Branch the authority to institute deportation proceedings under this Act, the 1917 legislation provided that a court sentencing a defendant for a crime of moral turpitude could bar immigration officials from deporting the alien on the basis of that crime. Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 889, codified as amended at 8 U.S.C. § 1251(b)(2) (1988), repealed by the Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050. The judicial recommendation against deportation (JRAD) represented a significant infringement on the discretionary authority of the Executive Branch. *See, e.g., Velez-Lozano* v. *INS*, 463 F.2d 1305, 1308 (D.C. Cir. 1972) (per curiam) ("Such a recommendation, if timely issued, is absolutely binding on the Attorney General and leaves him with no discretionary authority."); *Oboh II*, 92 F.3d at 1086-1087.[16]

Judicial involvement in deportation matters has continued to the present day. Besides enacting Section 3583 (d) in 1984, Congress has authorized additional forms of judicial deportation in several recent statutes. In the Immigration and Nationality Technical Corrections Act of 1994, Congress expressly provided for judicial deportation of criminal aliens under the INA, even in cases where the Attorney General recommends relief from deportation. Pub. L. No. 103-416, § 224, 108 Stat. 4305, 4322

[16] Congress's repeal of the JRAD procedure in 1990 hardly "suggests a movement away from providing judicial control which binds the INS." Pet. Br. 30. Rather, it reflects the uniform and continuing trend of recent congressional efforts to facilitate and expedite the deportation of criminal aliens. As correctly construed by the court of appeals in this case, Section 3583(d) is entirely consistent with that legislative trend.

(1994), codified at 8 U.S.C. § 1252a(d) (1994). In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Congress expanded the INA's judicial deportation provision by authorizing a judicial order of deportation against any alien "who is deportable." Pub. L. No. 104-208, § 374, 110 Stat. 3009 (1996), *reproduced at* 138 Cong. Rec. H11813-H11814 (daily ed. Sept. 28, 1996), to be codified at 8 U.S.C. § 1228(c). Congress also enacted a new provision authorizing court-ordered deportation of criminal aliens upon stipulation, and amended 18 U.S.C. § 3563(b) by authorizing district courts to order deportation as a condition of probation. *Ibid.*[17]

In short, for most of this Nation's history Congress has either required or authorized the courts to play a role in the deportation process.[18] Thus, while it is certainly true

[17] In the Senate Report on the bill that became IIRAIRA, the Judiciary Committee observed that "[a]liens who violate U.S. immigration law should be removed from this country as soon as possible. . . . Aliens who are required by law *or the judgment of our courts* to leave the United States are not thereby subjected to a penalty." S. Rep. No. 249, 104th Cong., 2d Sess., at 7 (1995) (emphasis added). In fact, the bill passed by the Senate would have provided that "any *State* court with jurisdiction to enter judgments in criminal cases is authorized to make a finding that the defendant is deportable." S. 1664, § 165 (emphasis added); *see* 142 Cong. Rec. S4730, S4745 (May 6, 1996).

[18] The cases cited by petitioner in support of the proposition that "district courts lack the jurisdiction to order the deportation of aliens" (Pet. Br. 19) are inapposite because none involved a statute expressly conferring deportation authority on the court. In any event, it is by no means clear that district courts do not have the authority to order the deportation of alien defendants even absent express congressional authorization, because "[t]he sentencing judge has broad discretion in setting probation conditions [or conditions of supervised release], including restricting fundamental rights." *United States* v. *Bolinger*, 940 F.2d 478, 480-481 (9th Cir. 1991); *see, e.g., United States* v. *Campos-Serrano*, 404 U.S. 293, 294 n.2 (1971) (noting that in a previous criminal proceeding

that "control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature" (*Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982)), giving effect to the plain meaning of Section 3583(d) is in no way at odds with the traditional alloca-

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respondent's "sentence was suspended, and the respondent was placed on probation for three years 'on condition that he return to Mexico and not return to the United States illegally' "); *United States* v. *Janko*, 865 F.2d 1246, 1246-1247 (11th Cir. 1989) (affirming sentence, based upon plea agreement, of "six months in the Attorney General's custody, a [suspended] sentence, and . . . probation on the special condition that [defendants] leave the United States by a certain date and not return other than by lawful means"); *United States* v. *Wieczorek*, 836 F.2d 1343 (4th Cir. 1988) (Table), No. 87-5548, 1988 WL 1083, at *1 (4th Cir. Jan. 7, 1988) (affirming sentence of "three years of probation with the special condition that [the alien defendant] consent to deportation" and noting defendant was deported one week after sentencing); *United States* v. *Negron*, 548 F.2d 1085, 1086 (2d Cir.) (rejecting motion "to vacate as illegally imposed a sentence of ten years imprisonment and a 15-year special parole term, with the special condition that Negron be deported to Colombia, South America, upon completion of the jail sentence" and affirming sentence), *cert. denied*, 433 U.S. 912 (1977); *Reyes-Cerna* v. *INS*, 345 F. Supp. 1348, 1348 (N.D. Ill. 1972) (noting that alien plaintiff suing for permission to reapply for admission to the United States had been previously convicted and given "five years probation with the condition that he be deported to Mexico and not re-enter the United States illegally during the probation period"). Since the passage of the Sentencing Reform Act, district courts can impose conditions of probation or supervised release requiring defendants to "refrain from residing in a specified place" and to "satisfy such other conditions as the court may impose." 18 U.S.C. § 3563(b)(14) & (22); *see* 18 U.S.C. § 3583(d); *see also United States* v. *Gil*, 46 F.3d 1134 (7th Cir. 1995) (Table), Nos. 94-1713 & 94-1959, 1995 WL 23136, at *1 (7th Cir. Jan. 19, 1995) (affirming conviction and sentence of "240 months imprisonment, to be followed by 10 years supervised release, with deportation as a special condition of [such] release"), *cert. denied*, 115 S. Ct. 2014 (1995); *United States* v. *Pugliese*, 960 F.2d 913, 915 (10th Cir. 1992) ("District courts have wide latitude to determine the extent of geographic restrictions as conditions of supervised release").

tion of authority between the Executive and Judicial Branches.[19]

2. *The Procedural Differences Between Administrative Deportation And Deportation Under Section 3583(d) Provide No Support For Petitioner's Interpretation Of The Statute*

Petitioner contends that it would have been "extraordinary" and "inconceivable" for Congress to authorize judicial deportation of criminal aliens without providing procedural protections and avenues of relief identical to those available in administrative proceedings. Pet. Br. 17, 30-31. This contention is unpersuasive.

The statutory procedural requirements applicable to administrative deportation proceedings are unexceptional:

> (1) the alien shall be given notice . . . of the nature of the charges against him and of the time and place at which the proceedings will be held;

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[19] Petitioner also argues that "the Eleventh Circuit concluded that Congress *sub silentio* granted the Judicial Branch . . . the authority to deport aliens." Pet. Br. 29. Section 3583(d) is hardly "silent" on this subject, however; it expressly states that district courts may provide that alien defendants be deported as a condition of supervised release. Petitioner is presumably referring to the fact that the legislative history of the Sentencing Reform Act does not appear to shed additional light on the meaning of Section 3583(d). But the rule that statutes mean what they say does not depend for its validity on the existence of confirmatory statements in the legislative history. *See, e.g., Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("It would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."); *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 n.2 (1992). The case relied upon by petitioner, *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), is not to the contrary, because in that case the statutory text itself did not demonstrate congressional intent to change the law in the manner suggested.

> (2) the alien shall have the privilege of being represented (at no charge to the Government) by such counsel . . . as he shall choose;
>
> (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and
>
> (4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

8 U.S.C. § 1252(b). Contrary to the premise of petitioner's argument, the procedural protections provided to criminal defendants at sentencing are not significantly different from those available in administrative deportation proceedings.

The defendant in a sentencing proceeding has constitutional rights that do not apply in administrative deportation proceedings. *See, e.g., Abel* v. *United States*, 362 U.S. 217, 237 (1960) ("deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions"). Most saliently, criminal defendants (unlike aliens in administrative deportation proceedings) have the right to be represented by court-appointed counsel at sentencing. *Mempa* v. *Rhay*, 389 U.S. 128, 134 (1967).

Before deportation may be imposed as a condition of supervised release, moreover, alien defendants must be given reasonable notice, either in the presentence report or by the court itself, that deportation is a potential sentencing consideration. Fed. R. Crim. P. 32(b)(4)(B); *Burns* v. *United States*, 501 U.S. 129 (1991). The sentencing hearing, at which the defendant must be allowed to comment on the proposed sentence, provides an ample opportunity to be heard, and may include the introduction of evidence. Fed. R. Crim. P. 32(c)(1); *see also* U.S.S.G. § 6A1.3 (policy statement) ("When any factor important to the sentencing determination is reasonably in dispute, the

parties shall be given an adequate opportunity to present information to the court regarding that factor").

In addition, a defendant ordered deported as a condition of supervised release can challenge the sentence by appeal (18 U.S.C. § 3742(a)) or by motion attacking sentence (28 U.S.C. § 2255), whereas an alien ordered deported under the INA has relatively limited opportunities for judicial review of the administrative determination, particularly after the implemention of IIRAIRA. *See* Brief for *Amici Curiae* American Immigration Lawyers Ass'n, *et al.* (AILA Br.), at 15-17. While not precisely congruent with the procedures employed in proceedings under the INA, these protections are plainly sufficient to ensure that defendants are not unjustifiably deported under Section 3583(d). *See Oboh II*, 92 F.3d at 1087.[20]

Moreover, the discretionary nature of the district court's authority under Section 3583(d) provides a complete response to petitioner's concern that "aliens deported under § 3583(d) would be deprived of . . . the opportunity to obtain asylum or other discretionary relief available in INS proceedings." Pet. Br. 30-31; *see also* U.S. Br. 29 & n.13; AILA Br. 13. Section 3583(d) states that a district court "*may* provide . . . that [an alien defendant] be deported" (emphasis added). If the probation officer (or the district court) notifies an alien defendant that deportation may be an appropriate condition of his supervised release, the defendant is free to argue that he should not be deported for any reason—including, but not limited to, all of the grounds available in administrative proceed-

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[20] Consequently, petitioner and his *amici* err in contending that allowing judicial orders of deportation under Section 3583(d) would violate due process. *See* Pet. Br. 25-27; Brief for *Amicus Curiae* American Bar Association 6-21; AILA Br. 18-24. *Cf.* U.S. Br. 36 n.18 ("We do not agree . . . that, if Section 3583(d) were interpreted to grant district courts authority to enter judicial orders of deportation, constitutional problems would arise.").

ings—and the district court has ample authority to decline to order deportation on such grounds.[21]

3. *The Predecessor Statutes To Section 3583(d) Do Not Undermine The Plain-Language Interpretation Of That Provision*

Petitioner and the Solicitor General assert that the deportation clause of Section 3583(d) appears to derive from former 18 U.S.C. § 4212 (1976) (repealed 1984), a statute that authorized federal parole agencies to release alien prisoners to the INS for deportation. Pet. Br. 17-22; U.S. Br. 20-23.[22] They argue that, because the parole board apparently had no independent authority to order

[21] For example, aliens who are convicted of aggravated felonies are deportable and generally cannot request discretionary relief in an administrative deportation proceeding. *See* 3 Gordon, Mailman & Yale-Loehr, *Immigration Law and Procedure* § 71.05[2][c] (1996) (describing restrictions on aggravated felons). At a sentencing hearing, by contrast, a defendant convicted of an aggravated felony could nonetheless argue that the court should not impose deportation as a condition of his supervised release, and the court—unlike the Attorney General—would have the authority to exercise its discretion in the defendant's favor.

[22] In its most recent iteration before being repealed, the parole statute provided:

> When an alien prisoner subject to deportation becomes eligible for parole, the [Parole] Commission may authorize the release of such prisoner on condition that such person be deported and remain outside the United States.
>
> Such prisoner when his parole becomes effective, shall be delivered to the duly authorized immigration official for deportation.

18 U.S.C. § 4212 (1976). Section 4212 originated in the Act of Mar. 2, 1931, ch. 371, 46 Stat. 1469, codified at 18 U.S.C. § 716, amended by Act of June 25, 1948, ch. 645, § 4204, 62 Stat. 854, and recodified at 18 U.S.C. § 4204 (1952), amended by the Parole Commission and Reorganization Act, Pub. L. No. 94-233, § 4212, 90 Stat. 219, 227 (1976), and recodified at 18 U.S.C. § 4212, repealed by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, §§ 218(a)(5) & 235, 98 Stat. 2027 & 2031.

deportation (*Secchi* v. *U.S. Bureau of Immigration*, 58 F. Supp. 569 (M.D. Pa. 1945)), Congress must not have granted such authority to the district courts in enacting Section 3583(d). *See, e.g.*, Pet. Br. 22 (" 'This background suggests that § 3583(d), like its predecessor governing parole, does not authorize a judicial order of deportation' ") (quoting *Oboh II*, 92 F.3d at 1091 (Barkett, J., dissenting)). This argument suffers from several fatal flaws.

First, the predecessor to § 4212 was necessary to coordinate the roles of the United States Board of Parole and the Bureau of Immigration, because parole rules at that time required that parolees remain within the jurisdiction of the sentencing court. *See* H.R. Rep. No. 1035, 71st Cong., 2d Sess. 1 (1930); U.S. Br. 21. Congress therefore provided that the parole board could "authorize the release" of a prisoner who was both eligible for parole and subject to deportation, and that such a prisoner "shall be delivered to the duly authorized immigration official for deportation." 18 U.S.C. § 4212 (1976).

In contrast to the limited powers of federal parole agencies, the power of federal district courts to impose terms of supervised release is not subject to any territorial constraints. When Congress restructured the federal sentencing scheme in 1984, it abolished any requirement that released prisoners remain within the jurisdiction of the sentencing court. *See* 18 U.S.C. § 3563(b)(15) ("The court *may* provide . . . that the defendant . . . remain within the jurisdiction of the court") (emphasis added); *see also* 18 U.S.C. § 3583(d) ("[t]he court *may* order . . . any condition set forth as a discretionary condition of probation") (emphasis added). There was, accordingly, no need for a statute authorizing courts to order criminal defendants delivered to the INS for the initiation of administrative deportation proceedings. As discussed above (*see supra* at 21-22 & n.10), such an order is well within the court's authority to require a defendant to satisfy

"any . . . condition [the court] considers to be appropriate" (18 U.S.C. § 3583(d)), and would not conflict with any of the mandatory terms of supervised release.

Second, although Congress may have borrowed some language from Section 4212 in enacting Section 3583(d), the substantive differences between the statutes are striking. Section 3583(d) states that when a district court is sentencing an alien defendant who is subject to deportation, the court may "provide . . . that he be deported." Section 4212, in contrast, stated that the Parole Commission "may authorize the release" of an alien prisoner who was subject to deportation. If Congress had truly intended to invest the court only with power analogous to that previously exercised by the parole agencies under Section 4212, there would have been no reason to alter this language.

Moreover, if the Parole Commission authorized the release of an alien defendant pursuant to Section 4212, the statute provided that he "shall be delivered" to immigration officials "for deportation." In contrast, if a district court orders an alien defendant deported pursuant to Section 3583(d), the court "may order" that he be delivered to the INS "for *such* deportation" (emphasis added). The reference to "such" deportation necessarily contemplates the court-ordered deportation authorized by Section 3583(d), not an administrative order of deportation. These significant structural and textual differences between the statutes confirm that, although Section 4212 was merely a release and delivery provision, Section 3583(d) in fact authorizes district courts to require the deportation of alien defendants.

4. *The Subsequent Legislation Cited By Petitioner And The Solicitor General Does Not Affect The Proper Interpretation Of Section 3583(d)*

Petitioner complains that the Eleventh Circuit's interpretation of Section 3583(d) "cannot logically be squared" (Pet. Br. 24) with the INA's judicial deportation provi-

sion, which Congress enacted in 1994 and modified recently in the IIRAIRA. *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 224, 108 Stat. 4305, 4322 (1994), codified at 8 U.S.C. § 1252a(d), amended by IIRAIRA § 374, *reproduced at* 138 Cong. Rec. H11813-H11814 (daily ed. Sept. 28, 1996), to be codified at 8 U.S.C. § 1228(c); *see also* U.S. Br. 33-39. These amendments, however, do not undermine the court of appeals' plain-language interpretation of Section 3583(d).

The 1994 amendment added a new provision to the INA which grants the district courts "jurisdiction to enter a judicial order of deportation at the time of sentencing" in cases involving certain criminal aliens. 8 U.S.C. § 1252a(d)(1) (1994). The IIRAIRA amended (and renumbered) this provision to make it applicable to any alien defendant "who is deportable." IIRAIRA § 374(a)(1), *reproduced at* 138 Cong. Rec. H11813 (daily ed. Sept. 28, 1996), to be codified at 8 U.S.C. § 1228(c)(1). Judicial orders of deportation under 8 U.S.C. § 1252a(d) are made upon request by the United States Attorney with the concurrence of the Commissioner of the INS, and the district court is authorized to grant or deny discretionary relief from deportation.

According to petitioner, it would be "anomalous" to hold that *both* 8 U.S.C. § 1252a(d) and Section 3583(d) authorize the entry of judicial deportation orders, particularly because Section 3583(d) assertedly contains no "procedural safeguards" and does not provide for the possibility of relief from deportation. Pet. Br. 24; *see also* U.S. Br. 35-37. As noted above (*supra* at 29-32), however, Section 3583(d) determinations are subject to all of the procedural protections applicable in sentencing hearings generally (including the right to appeal adverse determinations), and those protections are not meaningfully different from the procedural rights provided by 8 U.S.C. § 1252a(d). Proceedings under either statute provide

comparable, though not identical, procedural safeguards against unjustifiable deportation and offer opportunities for relief from deportation.

Petitioner and the Solicitor General thus err in contending that the court of appeals created a statutory anomaly by construing Section 3583(d) to authorize "summary" deportation for minor offenders while 8 U.S.C. § 1252a(d) provides procedural protections for more serious offenders. Pet. Br. 26; *see* U.S. Br. 37. Deportation under Section 3583(d) is hardly "summary," and in any event there is no basis for the claim that Section 3583(d) applies to minor offenders while 8 U.S.C. § 1252a(d) governs only the most heinous criminals. To the contrary, Section 3583(d) is potentially applicable to all relatively serious offenders (including those who commit "heinous" crimes), whereas 8 U.S.C. § 1252a(d) encompasses more minor offenders.[28]

The Solicitor General suggests that the court of appeals' interpretation of Section 3583(d) "render[s] Section 1252a(d) meaningless," and argues that "Congress must be presumed not to have performed such 'a useless act' in enacting Section 1252a(d)." U.S. Br. 37 (citation omitted). But the plain language of Section 3583(d) can easily be given effect without depriving 8 U.S.C. § 1252a(d) of its separate sphere of operation. Although Section 3583(d) and 8 U.S.C. § 1252a(d) potentially apply to many of the same defendants, they serve different functions. Section 3583(d) is purely a sentencing provision concerning the power of the district court; Section 1252a(d) is a provision of the INA authorizing the Attorney General's delegees to seek and obtain a deportation order in a judicial rather than an administrative forum.

[28] Deportation under Section 3583(d) is an option only for defendants who have been sentenced to both a term of imprisonment and a term of supervised release. 18 U.S.C. § 3583(a); *see* U.S.S.G. § 5D1.1. Title 8 U.S.C. § 1252a(d), by contrast, encompasses less culpable defendants who have not been sentenced to any term of imprisonment at all. Thus, for example, an alien who commits two crimes of moral turpitude (such as fraud, *see Jordan* v. *DeGeorge*, 341 U.S. 223, 232 (1951) ("crimes in which fraud [is] an ingredient have always been regarded as involving moral turpitude")) may be subject to a judicial order of deportation under 8 U.S.C. § 1252a(d). *See* 8 U.S.C. § 1251(a)(2)(A)(ii). But the same defendant might not receive a term of imprisonment (*see* U.S.S.G. § 2F1.1) and accordingly would be ineligible for supervised release—including the deportation provision of Section 3583(d). To be sure, many defendants would be potential candidates for deportation under both statutes, but it is not precisely correct to suggest (*see* U.S. Br. 37) that Section 3583(d) is broader than 8 U.S.C. § 1252a(d).

Although the Government may "comment on" a criminal defendant's sentence (Fed. R. Crim. P. 32(c)(1)), sentencing determinations are made by the district court with the assistance of the probation officer, a judicial employee. Section 3583(d) sets forth the court's authority to include in the sentence of a deportable alien a requirement that the defendant be deported upon his release from prison; it is purely a grant of sentencing authority to the *Judiciary*. Thus, while the Government can suggest that such a condition is appropriate, it cannot appeal from the district court's refusal to require that the defendant be deported. *See* 18 U.S.C. § 3742(b). Moreover, given that Section 3583(d) is purely a sentencing provision, Congress had no cause to specify procedures different from those applicable to all other aspects of criminal sentencing.

The INA's judicial deportation provision, by contrast, is a mechanism whereby the Attorney General's delegees can request an order of deportation at the time of sentencing, obviating the need for a later administrative proceeding; it is a grant of initial authority to the *Executive*, subject to judicial review. If the district court denies a request for a judicial order of deportation under the INA, the Government may appeal. 8 U.S.C. § 1252a(d)(3)(A)(i). And because a proceeding under Section 1252a(d) is initiated by the Attorney General's delegees and takes the place of an administrative proceeding, it is unsurpris-

ing that Congress specified that the INA's procedures be followed.

Thus, Congress simply created two alternative mechanisms for deporting criminal aliens, one within the sole discretion of the federal courts as a sentencing option and the other aimed at expanding the Attorney General's opportunities to expedite the deportation of criminal aliens deemed undesirable by the Executive. It is not "extraordinary" (U.S. Br. 37) that the procedures employed under Section 3583(d) vary in certain respects from those applicable to proceedings under 8 U.S.C. § 1252a(d); rather, it is entirely consistent with Section 3583(d)'s role as purely a sentencing provision. By the same token, immigration legislation enacted since 1984 does not render the plain meaning of Section 3583(d) "illogical" (U.S. Br. 37)—it simply indicates that different Congresses attacked the same problem in different ways, and chose to create more than one avenue for expediting the removal of criminal aliens from the United States.[24]

For the same reasons, Section 3583(d) neither conflicts with nor renders superfluous the newly enacted authorization for district courts to order deportation as a condition of probation. *See* IIRAIRA § 374(b)(3), *reproduced at* 138 Cong. Rec. H11814 (daily ed. Sept. 28, 1996), to be codified at 18 U.S.C. § 3563(b)(21). Pro-

[24] Although petitioner correctly observes that "[t]he Eleventh Circuit's interpretation would create two parallel deportation processes" (Pet. Br. 7), his argument that such a result raises equal protection concerns (Pet. Br. 25-27) is baseless. In the first place, it is far from clear that any differences in procedures would result in different treatment for similarly situated aliens. In any event, "classifications among aliens made pursuant to the immigration laws 'need only be supported by some rational basis to fulfill equal protection guarantees' " (*United States* v. *Barajas-Guillen*, 632 F.2d 749, 752 (9th Cir. 1980)); it is not irrational for Congress to have relied on the traditional judicial procedures for criminal sentencing while requiring administrative-type procedures when the Attorney General seeks a judicial order of deportation in lieu of an administrative order.

bation and supervised release are mutually exclusive sentencing options (*see* 18 U.S.C. §§ 3551(b) & 3583(a)), and thus there is no overlap between this new provision and Section 3583(d).

Indeed, Congress's decision to authorize deportation as a condition of probation bolsters the plain-language interpretation of Section 3583(d). By definition, defendants who are sentenced to supervised release have also been sentenced to terms of imprisonment (*see* 18 U.S.C. § 3583(a)), and thus they have been found to be more culpable than defendants sentenced to probation in lieu of imprisonment. *See United States* v. *Granderson*, 114 S. Ct. 1259, 1266 (1994) ("Persons serving post-incarceration terms of supervised release generally are more serious offenders than are probationers."). It would be unreasonable to conclude that Congress has conferred on the courts the authority to order deportation of alien defendants as a condition of probation, but has not authorized the courts to impose deportation as a condition of supervised release for the clearly more culpable defendants subject to that sentence. Yet that would be the result of the interpretation urged by petitioner and the Solicitor General.

More fundamentally, petitioner and the Solicitor General err in placing any reliance on the recent amendments to the INA in interpreting Section 3583(d). In essence, they ask this Court to divine the intent of the 98th Congress, which enacted Section 3583(d), from legislation produced by Congresses convened a decade or more later. As the foregoing discussion amply demonstrates, " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980); *see also Sullivan* v. *Finkelstein*, 496 U.S. 617, 628 n.8 (1990) (acknowledging "all the usual

difficulties inherent in relying on subsequent legislative history").[25]

The use of subsequent legislative history is particularly inappropriate where, as in this case, it is offered to cloud an otherwise unambiguous statute. *Cf. Ratzlaf* v. *United States*, 114 S. Ct. 655, 662-663 (1994).[26] It bears re-emphasizing what Congress authorized the district courts to do:

> If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

18 U.S.C. § 3583(d). The plain language of the statute authorizes district courts to require the deportation of an alien defendant as a condition of supervised release, and to require that he be delivered to the INS for deportation in conformity with that court order. Nothing in the subsequent legislation relied on by petitioner has altered that plain meaning. "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it

[25] Indeed, were conclusions to be drawn from subsequent legislative action it could easily be inferred that Congress enacted new judicial deportation provisions in 1994 and 1996 in response to the erroneous conclusions of several courts of appeals that Section 3583(d) does not authorize district courts to order the deportation of criminal aliens as a condition of supervised release. *Cf. Quaye*, 57 F.3d at 450 ("the retroactive legislative history can be read the other way just as easily"). Moreover, the fact that subsequent Congresses, of different political composition, added additional deportation procedures sheds no light on the proper interpretation of the original provision.

[26] Petitioner erroneously invokes the canon that ambiguous statutes are to be construed in favor of the alien. Pet. Br. 10; *see also* AILA Br. 11. As with the analogous rule of lenity, the Court need not indulge in presumptions where, as here, the language of the statute is plain. *Cf. Moskal* v. *United States*, 498 U.S. 103, 107-108 (1990).

according to its terms.'" *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *see Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

1. [18 U.S.C.] § 3583. Inclusion of a term of supervised release after imprisonment

(a) In general.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) Authorized terms of supervised release.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

* * * *

(d) Condition of supervised release.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate ex-

perts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth

in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

* * * *

2. [8 U.S.C.] § 1251 [1988 ed. Supp. V]. Deportable aliens

(a) Classes of deportable aliens

* * * *

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years after the date of entry, and

(II) either is sentenced to confinement or is confined therefor in a prison or correctional institution for one year or longer,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after entry is deportable.

(iv) Waiver authorized

Clauses (i), (ii), and (iii) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

* * * *

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No. 96-7736

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LARRY OSA OGBOMON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF THE ELEVENTH CIRCUIT'S JUDGMENT

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QUESTION PRESENTED

Whether 18 U.S.C. § 3583(d) authorizes a district court to order, as a condition of supervised release, that an alien defendant who is subject to deportation be deported and remain outside the United States.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF THE ELEVENTH CIRCUIT'S JUDGMENT

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states. WLF devotes a significant portion of its resources to criminal justice reform and crime prevention efforts. As applied to immigration issues, those efforts have included working to ensure that aliens convicted of crimes are either incarcerated or deported. To that end, WLF has filed briefs in this and other federal courts in cases involving the immigration status of aliens found to have engaged in

criminal and/or fraudulent activities. *See, e.g., Immigration and Naturalization Service v. Yang*, 117 S. Ct. 350 (1996); *Immigration and Naturalization Service v. Elramly*, 117 S. Ct. 31 (1996).

WLF is concerned that insufficient steps are being taken to ensure that deportable aliens who have been convicted of crimes are deported immediately after their release from incarceration. Indeed, this case well illustrates the problem. Despite the district court's entry of a judicial deportation order, the Immigration and Naturalization Service (INS) allowed Petitioner to remain at large in this country for 15 months following his release from federal prison. During that period, Petitioner once again engaged in bank fraud, for which he has once again been sentenced to prison. WLF is concerned that the problem will only grow worse if the Court determines that judicial deportation orders are impermissible under 18 U.S.C. § 3583(d).

WLF is filing this brief with the consent of Petitioner and the United States. Consent letters have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, WLF hereby adopts the Statement of the Case contained in the *amicus curiae* brief filed by attorney Thomas Hungar in support of the judgment below.

In brief, Petitioner Larry Osa Ogbomon is a citizen of Nigeria who is appealing a sentence imposed upon him by the United States District Court for the Northern District of Georgia, following his plea of guilty to charges that he

unlawfully re-entered the United States following deportation, in violation of 8 U.S.C. § 1326. He was sentenced to 16 months' imprisonment, to be followed by a three-year term of supervised release which included, as a special condition, that he be deported. Petition Appendix ("Pet. App.") 2a. Mr. Ogbomon asserts that the district court lacked authority to order his deportation without affording him recourse to procedures set forth in the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*

Mr. Ogbomon's current journey through the American legal system began in 1991. In February 14, 1991, he was convicted in state court in DeKalb County, Georgia on various felony offenses but did not receive a sentence of incarceration. On June 10, 1991, he pled guilty in the U.S. District Court for the Northern District of Georgia to two counts of bank fraud. He received a 14-month prison sentence on August 30, 1991, but was released and deported to Nigeria on November 20, 1991.

On October 12, 1993, Mr. Ogbomon was found to be living in the United States again. On January 18, 1994, he pled guilty to one count of having entered the United States without consent of the Attorney General, after having previously been deported, in violation of 8 U.S.C. § 1326. The presentence report provided him with notice that his sentence might include a deportation order: the probation officer included in the report a recommendation that Mr. Ogbomon, as a condition of supervised release, be deported pursuant to 18 U.S.C. § 3583(d). Presentence Report ("PSR") 10. Mr. Ogbomon did not object to that recommendation, nor did he contest that he was an alien subject to deportation. PSR 12.

The district court sentenced Mr. Ogbomon to 16 months' imprisonment, to be followed by three years supervised release. Joint Appendix ("J.A.") 11-12. As a condition of supervised release, the district court ordered Mr. Ogbomon deported pursuant to 18 U.S.C. § 3583(d). He was directed to "take no action to appeal or resist deportation by the Immigration and Naturalization Service," and if deported, not to "reenter the United States during the term of supervised release." J.A. 12.

Mr. Ogbomon appealed the sentence, contending that the district court lacked authority to enter an order of deportation. On May 5, 1995, the U.S. Court of Appeals for the Eleventh Circuit affirmed. Pet. App. 1a-3a. Relying on its earlier decision in *United States v. Chukwura,* 5 F.3d 1420 (11th Cir. 1993), *cert. denied,* 115 S. Ct. 102 (1994), the Eleventh Circuit held that 18 U.S.C. § 3583(d) authorized district courts to order deportation as a condition of supervised release. The Eleventh Circuit denied Mr. Ogbomon's petition for rehearing and suggestion for rehearing en banc on January 22, 1996. J.A. 17-18.

In the meantime, Mr. Ogbomon had completed his term of incarceration in December 1994 and was released to the custody of the INS. In apparent conflict with the district court's deportation order, the INS thereafter released Mr. Ogbomon on bond. Brief for the United States ("U.S. Br.") 6 n.4. On June 5, 1995, an immigration judge entered a warrant of deportation ordering the INS to arrest and deport petitioner. *Id.* Despite that warrant, and despite the district court's order that he "take no action to appeal or resist any order of deportation" (J.A. 12), Mr. Ogbomon remained at liberty in the United States throughout the remainder of 1995, and he filed a motion

with an immigration judge seeking to reopen his deportation proceedings. *Id.* That motion was denied on February 1, 1996. *Id.*

On March 21, 1996, Mr. Ogbomon was arrested on new federal bank fraud charges. *Id.* at 7 n.5. He pleaded guilty to those charges and was sentenced by the U.S. District Court for the Northern District of Alabama to 24 months' imprisonment, to be followed by five years' supervised release. *Id.* One of the conditions of the supervised release was that he be deported immediately upon completion of his latest term of imprisonment. *Id.*

Following Mr. Ogbomon's arrest on the Alabama bank fraud charges, the district court in the instant case on April 10, 1996 revoked his three-year supervised release (without specifying the grounds therefor) and imposed a sentence of 12 months' imprisonment -- but no new term of supervised release. *Id.* at 6.

Mr. Ogbomon's April 22, 1996 petition for certiorari did not mention that the district court had revoked the three-year supervised release term that included the contested deportation condition. In its brief in response, the United States agreed with Mr. Ogbomon that 18 U.S.C. § 3583(d) does not authorize judicial deportation orders, and it asked that the Court grant the petition, vacate the Eleventh Circuit's judgment, and remand the case for further consideration in light of the United States's

position.[1] The Court granted the petition on October 1, 1996.

SUMMARY OF ARGUMENT

The language of § 3583(d) could not be clearer that district courts are authorized, as a condition of supervised release, to order the deportation of an alien who is subject to deportation. Mr. Ogbomon does not contest that he is an alien and is subject to deportation and thus has no cause to object to the district court's application of the statute to him in this case.

In any effort to discredit the Eleventh Circuit's interpretation of § 3583(d), Mr. Ogbomon and the United States have attempted to attribute to the appeals court a far broader reading of judicial deportation powers under § 3583 than that court actually adopted. The Eleventh Circuit did not hold that § 3583(d) grants district courts the power to issue deportation orders that are enforceable in their own right. Rather, since deportation is to be imposed under § 3583(d) only as a *condition* of supervised release, a district court may respond to violation of that condition only by revoking the supervised release and returning the alien defendant to prison for all or part of the remainder of the term of his supervised release. 18 U.S.C. §

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[1] The United States's position regarding the meaning of 18 U.S.C. § 3583(d) has not been consistent. In *Chukwura*, the United States asserted in March 1993 in the appeals court that § 3583 authorized a district judge to include deportation as a condition for supervised release. The United States adopted the opposite position in response to the certiorari petition filed in *Chukwura*, and it has subsequently adhered to the position that § 3583 merely permits a district court to *recommend* deportation to the INS.

3583(e)(3). Interpreting § 3583(d) in this limited manner eliminates any inconsistency between that statute and 8 U.S.C. § 1252a(d), which also authorizes judicial deportation orders -- but in different circumstances and subject to a different set of procedural rules.

The alternative interpretations of § 3583(d) offered by Mr. Ogbomon and the United States are unpersuasive not only because they do violence to the unambiguous statutory language but also because they would render the statute a dead letter. The purposes that the United States alleges are achieved by § 3583(d) are already fully (and far less ambiguously) achieved by other statutes.

ARGUMENT

I. THE LANGUAGE OF SECTION 3583(d) COULD NOT BE CLEARER THAT DISTRICT COURTS ARE AUTHORIZED, AS A CONDITION OF SUPERVISED RELEASE, TO ORDER THE DEPORTATION OF AN ALIEN SUBJECT TO DEPORTATION

Mr. Ogbomon does not contest that Congress has the constitutional authority to empower courts to issue deportation orders if it chooses to do so. Accordingly, the only issue in this case is whether Congress intended to grant such power to federal district courts when it adopted 18 U.S.C. § 3583(d).

The best indication of congressional intent is, of course, the statutory language itself. When the meaning conveyed by that language is clear, there is no need to resort to other tools of statutory construction. The Court "must presume that a legislature says in a statute what it

means and means in a statute what it says there." *Connecticut National Bank v. Germain,* 502 U.S. 249, 253-54 (1992). "When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 254 (quoting *Rubin v. United States,* 449 U.S. 424, 430 (1981)).

The language of 18 U.S.C. § 3583(d) could not be clearer that district courts are authorized, as a condition of supervised release, to order the deportation of an alien who is subject to deportation. The language at issue states, in its entirety:

> If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

18 U.S.C. § 3583(d).

The statute unequivocally states that a district court, when sentencing a convicted criminal to a term of "supervisory release" (to be served following completion of a term of imprisonment), is authorized to "provide ... that [the criminal] be deported and remain outside the United States," subject to only two limitations. The first limitation is that the defendant must be an alien. Second, (s)he must be "subject to deportation." WLF does not understand Mr. Ogbomon to assert that those two conditions have not been met in this case. Accordingly, § 3583(d) unambiguously authorized the district court to condition Mr. Ogbomon's supervised release on his being deported and remaining

outside the United States during the period of his supervised release.

Section 3583(d) nonetheless places clear limitations on a district court's power to effect compliance with its sentence. It may not, for example, direct a U.S. Marshal to take the defendant into custody and place him on board an international flight; rather, the final clause of § 3583(d) makes clear that any deportation must be carried out under the auspices of the INS. Moreover, § 3583(d) states that deportation is to be imposed only as a *condition* of supervised release, rather than being imposed directly as part of the sentence. Accordingly, if a criminal fails to comply with such a condition of supervised release because (for whatever reason) he is not deported immediately following completion of his prison sentence, the district court may respond by revoking the supervised release and returning the criminal to prison for all or part of the remainder of the term of his supervised release (18 U.S.C. § 3583(e)(3)) -- not by initiating contempt of court proceedings against those responsible for the failure to deport the criminal.

The district court at all times in this case acted within the confines of § 3583(d). As noted above, it is uncontested that Mr. Ogomon is an alien and was "subject to deportation."[2] In imposing deportation as a condition of supervised release, the district court did not attempt to bypass immigration officials; rather, it directed that Mr.

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[2] The term "subject to deportation" in § 3583(d) is, presumably, synonymous with the term "deportable" -- which is defined in 8 U.S.C. § 1251. Mr. Ogbomon is "deportable" on several grounds, including that he entered the United States "without inspection" (§ 1251(a)(1)(B)), and that he was sentenced to confinement in a prison for one year or longer (§ 1251(a)(2)(A)(i)(II)).

Ogbomon was to "depart the United States when ordered to do so" by the INS. J.A. 12. When, in April 1996, the district court learned that Mr. Ogbomon had failed to comply with numerous conditions of his supervised release (including the condition that he be deported), it acted appropriately by revoking the supervised release -- rather than by attempting to effectuate immediate deportation.[3]

The various alternative interpretations of § 3583(d) offered by Mr. Ogbomon and the United States fail to explain much of the wording of that statute. More importantly, § 3583(d) would serve no apparent purpose if interpreted as Mr. Ogbomon and the United States have suggested. Only the interpretation adopted by the district court -- an interpretation that relies on the plain meaning of the statutory language -- renders § 3583(d) something more than mere surplusage.

A. Petitioner's and the United States's Interpretation of § 3583(d) Fails to Explain the Language Authorizing Deportation as a Condition of Supervised Release

While Mr. Ogbomon and the United States argue strenuously that § 3583(d) should not be interpreted as authorizing a district court to order deportation as a condition of supervised release, they have been unable to articulate a plausible alternative interpretation. All

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[3] The district court did not specify its grounds for revoking Mr. Ogbomon's supervised release (which began in December 1994 following completion of his prison sentence). Nonetheless, the district court's awareness that Mr. Ogbomon had violated the "deportation" condition of his supervised release suggests that that violation was factored into the district court's revocation decision.

proposed alternative constructions would rob § 3583(d) of any force and thus violate the cannon of statutory construction that Congress intends each provision of a statute to have meaning.

Mr. Ogbomon and the United States contend that § 3583(d) was intended to make clear that the INS may deport an alien criminal even while he is serving a term of supervised release. They argue that in the absence of § 3583(d), deportation by the INS might be regarded as inconsistent with "supervised" release, since it would be virtually impossible for probation officers to supervise released criminals after they have been deported from the country. U.S. Br. 18-19; Brief for Petitioner ("Pet. Br.") 9-10, 21-22. The most obvious deficiency in that argument is that it does not comport with the statutory language; there would have been no reason for Congress to empower *a district court* to "provide, as a condition of supervised release, that [an alien defendant] be deported" if its intent was to empower *the INS* to deport an alien defendant during a term of supervised release.

Moreover, as the United States acknowledges (U.S. Br. 19), Congress adopted a provision empowering the INS to deport alien defendants serving a term of supervised release, *at the very same time* that it enacted § 3583(d). The Sentencing Reform Act of 1984, Pub. L. No. 98-473, which first enacted § 3583(d), also amended 8 U.S.C. § 1252(h), § 242(h) of the INA, to provide that an alien criminal serving a term of supervised release was not exempt from deportation by the INS. As amended, § 1252(h) provided:

> An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated

> by the release of the alien from confinement. Parole, *supervised release*, probation, or possibility of rearrest or further confinement in respect of the same offense shall not be a ground for deferral of deportation.

8 U.S.C. § 1252(h). Section 1252(h) states unambiguously that supervised release is not an impediment to deportation by the INS. Accordingly, Mr. Ogbomon's and the United States's proposed interpretation of § 3583(d) would render it essentially meaningless, since (under that interpretation) § 3583(d) would accomplish nothing not already accomplished by § 1252(h). While it is conceivable that Congress might express its intent in two separate places in a statute in order to ensure that its intent was not misconstrued, it is not plausible that it would express that intent so obscurely on a second occasion after having expressed itself so clearly the first time. By enacting § 1252(h), Congress demonstrated its ability to convey unambiguously that the existence of a term of supervised release would have no effect on deportation proceedings. If Congress had intended to drive home that point a second time by enacting § 3583(d), one would have expected Congress to use similarly unambiguous language -- rather than the language actually employed in § 3583(d), which can be made to fit the construction suggested by Mr. Ogbomon and the United States only by application of tortured interpretative reasoning.

The United States suggests one other rationale for § 3583(d) under its limiting interpretation of that statute:

> Section 3583(d) serves the government's purpose of establishing an efficient means of reimprisoning an alien defendant who reenters the United States during such term. In addition to authorizing a district court

> to provide for deportation, Section 3583(d) authorizes a district court to provide that an alien defendant, who is subject to deportation, must remain outside the United States during the period of his supervised release. Consequently, if any such alien defendant reenters the United States, the United States may arrest that alien for violation of a condition of supervised release and reimprison him in accordance with Section 3583(d), without having to pursue a new and independent criminal prosecution under 8 U.S.C. § 1326, for unlawful reentry after deportation.

U.S. Br. 23 n.11. That rationale lends meaning to the second of the two conditions of supervised release authorized by § 3583(d) -- that the alien defendant "remain outside the United States." But it does nothing to lend meaning to the first of the two authorized conditions -- that the alien "be deported." The government's alleged interest in an efficient means of reimprisoning an alien defendant who reenters the country following deportation but before completion of his term of supervised release is in no way served by § 3583(d)'s authorization of deportation as a condition of supervised release.

Finally, several of the courts of appeals that have adopted the United States's limited interpretation of § 3583(d) have concluded that the statute does no more than permit district courts to make a "recommendation" of deportation to the INS. *See, e.g., United States v. Kassar*, 47 F.3d 562 (2d Cir. 1995). That interpretation does not comport with the language of the statute (which contains no wording suggesting that the authorized conditions of supervised release are nonbinding in character) and drains all meaning from § 3583(d) -- since federal judges would be free to recommend the deportation of deportable alien

criminals even in the absence of § 3583(d), and since one would expect the INS to initiate steps to deport deportable alien criminals even in the absence of a nonbinding recommendation from a federal judge.

In sum, those who take issue with the Eleventh Circuit's interpretation of § 3583(d) have failed to articulate a plausible alternative interpretation. Each of the suggested alternatives is inconsistent with the wording of the statute and fails to provide any independent significance to the language authorizing deportation as a condition of supervised release.

B. Section 3583(d)'s "Subject to Deportation" Language Is Rendered Meaningless by Petitioner's and the United States's Interpretation of the Statute

Mr. Ogbomon's and the United States's interpretation of § 3583(d) hinges on their claim that district judges are not empowered to determine whether an alien is "subject to deportation." But that interpretation renders the entire statute meaningless, because a district judge will never or virtually never be in a position to invoke the statute if (s)he is not permitted to determine who is "subject to deportation."

Section 3583(d) states that "[i]f an alien defendant is subject to deportation," a district court may take certain actions, including imposing deportation as a condition of supervised release. In other words, unless there is a finding that the alien defendant is "subject to deportation," § 3583(d) is inoperative and a district judge may not take the steps outlined therein. If, as Mr. Ogbomon and the United States contend, district judges are not empowered to

determine who is "subject to deportation," the question arises how a district judge imposing sentence in a criminal case could ever invoke § 3583(d) -- even for such limited purposes as ordering that the defendant be delivered to the INS following completion of his prison sentence.

> The United States asserts:
>
> Section 3583(d) can only be interpreted as authorizing the sentencing court to provide, as a condition of supervised release, that an alien defendant who is subject to deportation, *i.e.*, an alien *who has been or will be ordered deported* by the Attorney General under the INA, be surrendered to immigration officials for deportation proceedings under the INA.

U.S. Br. 30 (emphasis added). The illogic of the United States's position is readily apparent. For purposes of § 3583(d), the United States defines an alien "subject to deportation" as an alien who either: (1) has been ordered deported; or (2) will be ordered deported by the Attorney General. *Id.* But a district judge preparing to impose sentence in a criminal case will have no way of knowing whether, at some future time, the Attorney General will order the alien defendant deported. Thus, under the United States's view of the statute, the district judge will be in a position to invoke § 3583(d) only in those rare instances in which the alien defendant has already been ordered deported. And of course, under those circumstances, resort to § 3583(d) would be wholly unnecessary in order to ensure that the alien defendant is deported following completion of his prison sentence.

Both the First Circuit and the Tenth Circuit -- which concur with the United States's position regarding the scope

of § 3583(d) -- were forced to engage in circular reasoning in order to explain away § 3583(d)'s "subject to deportation" language. The Tenth Circuit reasoned:

> [Section] 3583(d) can only be interpreted as allowing "the sentencing court to order, as a condition of supervised release, that an 'alien defendant [who] is subject to deportation' be surrendered to immigration officials for deportation proceedings under the [INA] . . . for the purpose of determining whether he is 'an alien defendant . . . subject to deportation.'"

United States v. Phommachanh, 91 F.3d 1383 (10th Cir. 1996)(citing *United States v. Sanchez*, 923 F.2d 236, 237 (1st Cir. 1991). Neither the First nor Tenth Circuits bothered to explain how a district judge is supposed to determine whether a defendant is among those subject to being surrendered to INS officials by virtue of being "subject to deportation," if (as those courts insisted) only "immigration officials" may determine whether an alien defendant is "subject to deportation."

Mr. Ogbomon objects that the Eleventh Circuit's interpretation of § 3583(d) "invokes an impossible situation because the central requirement that the alien must be 'subject to deportation' involves a determination that the district court lacks jurisdiction to resolve." Pet. Br. 23. He contends that the sole authority to decide who is "subject to deportation" resides with the INS. *Id.* But for the reasons explained above, § 3583(d) is rendered meaningless unless it is interpreted as empowering district courts to determine which alien defendants are "subject to deportation." Section 3583(d) provides district courts with all the "jurisdiction" they need in order to make such determinations.

8 U.S.C. § 1251, which declares certain classes of aliens to be "deportable," provides district courts with adequate guidance to determine which alien defendants are "subject to deportation" for purposes of § 3583(d). An alien defendant is free, of course, to appeal a sentence that includes deportation as a condition of supervised release, on the ground that he was not, in fact, "subject to deportation." But that issue is not present in this case, since Mr. Ogbomon (by virtue of his illegal entry into the country and his history of incarceration) cannot seriously deny that he is "deportable" under § 1251 and thus "subject to deportation" under § 3583(d).

In sum, § 3583(d) will be rendered a dead letter unless it is interpreted as empowering district courts to determine, prior to imposing sentence, whether an alien defendant is "subject to deportation." The interpretation proposed by Mr. Ogbomon and the United States must be rejected because it would deny that power to district courts.

C. No Significance Can Be Attached to Section 3583(d)'s Use of the Word "Provide" Rather Than the Word "Order"

Section 3583(d) states that a district court may, in certain circumstances, "*provide*, as a condition of supervised release that [an alien defendant] be deported . . . ." (emphasis added). Mr. Ogbomon and the United States note that elsewhere in § 3583(d), district courts are empowered to "order" certain other conditions of supervised release. They insist that the use of the word "provide" rather than the word "order" with respect to deportation was an effort by Congress to indicate that district courts could not "order" deportation and that district courts possessed only limited powers when it came to directing

the deportation of an alien as a term of supervised release. Pet. Br. 15-16; U.S. Br. 16-17.

The argument is without merit. The words "provide" and "order" are used interchangeably as verbs in common parlance to convey that the subject of the sentence has issued some sort of directive. No rule of statutory construction requires that distinct meanings be attached to synonyms simply because both are used in the same statute. Mr. Ogbomon erroneously cites *United States National Bank of Oregon v. Independent Ins. Agents,* 113 U.S. 2173 (1993), as supporting such a rule of construction. That case stands for a wholly different proposition: that "identical words used in different parts of the same act are intended to have the same meaning." *United States National Bank,* 113 S. Ct. at 2185. Thus, while one can assume that Congress intended the verb "order" to convey the same meaning each time it was used in § 3583(d), there is no basis for assuming that Congress intended something altogether different when it used the word "provide" in that statute.

In an effort to strengthen their argument that Congress intended discrete meanings for the verbs "provide" and "order," both Mr. Ogbomon and the United States have offered misleading dictionary definitions of the word "provide." Noting that one definition of "provide" is "to exercise foresight in taking due measures in view of a possible event," they suggest that § 3583(d)'s use of the word "provide" in connection with a district court's deportation powers was intended to authorize district courts to set the stage for potential future INS deportations rather than to authorize deportation orders by the district court itself. Pet. Br. 15-16; U.S. Br. 16-17.

The flaw in this resort to dictionary definitions is that Mr. Ogbomon and the United States have supplied one of several definitions of "provide" when used as an intransitive verb, while § 3583(d) quite clearly uses the word "provide" as a transitive verb.[4] One of the dictionary definitions of "provide" when used as a transitive verb ("to state as a condition; stipulate") is quite similar to a definition for the verb "order," as is one of the dictionary definitions of "provide" when used as an intransitive verb ("to make a condition; stipulate"). *See Webster's New World Dictionary* 1145 (2d ed. 1972).

Without regard to the distinction between transitive and intransitive verbs, a straightforward reading of § 3583(d) makes plain that Congress did not intend to use the word "provide" in the sense claimed by Mr. Ogbomon and the United States. If one were intending to "provide" for a *possible* future INS deportation order (in the sense suggested by Mr. Ogbomon and the United States), one would take such foresightful measures as buying a plane ticket. The judicial decree that § 3583(d) permits a district court to "provide" (a decree that an alien defendant's term of supervised release be conditioned on his being deported) simply cannot be viewed as a foresightful measure designed to expedite proceedings in the event of a deportation order by others.

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[4] A transitive verb is one which has an object, while an intransitive verb lacks an object. Thus, "provide" (as used in § 3583(d)) is a transitive verb whose object is the subordinate clause "that [the alien defendant] be deported and remain outside the United States." An example of the use of "provide" as an intransitive verb conveying the meaning cited by Mr. Ogbomon and the United States is found in the Preamble to the Constitution: "to *provide* for the common defense."

D. There Is No Inconsistency Between § 3583(d) As Interpreted by the Court Below and § 1252a(d)

Ten years after adoption of § 3583(d) in 1984, Congress added subsection (d) to § 242A of the INA, 8 U.S.C. § 1252a(d). *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 224(a). Section 1252a(d) provides for entry of judicial deportation orders under specified circumstances. Both Mr. Ogbomon and the United States claim that § 3583(d) as interpreted by the Eleventh Circuit is inconsistent with § 1252a(d), and point to § 1252a(d) as evidence that Congress did not intend to permit § 3583(d) to serve as the basis for judicial deportation orders. U.S. Br. 33-38; Pet. Br. 24.

Those claims are without merit. WLF notes initially that evidence of congressional intent in 1994 is of limited value in determining what Congress intended by its adoption of § 3583(d) in 1984. Section 3583(d) must be interpreted based on the intent of those serving in Congress in 1984 (as conveyed by their chosen statutory language), not based on what those serving in Congress in 1994 thought it might mean.

Moreover, nothing in § 1252a(d) is inconsistent with § 3583(d). Section 1252a(d) provides that in sentencing an alien defendant convicted of certain major felonies, a district court may order the defendant to be deported if requested to do so by the U.S. Attorney with the concurrence of the INS Commissioner. Before any such order is entered, the defendant is entitled to the numerous procedural protection outlined in § 1252a(d)(2).

Mr. Ogbomon contends that the Eleventh Circuit's interpretation of § 3583(d) must be incorrect, because under

that interpretation an alien who had committed major felonies could invoke the numerous procedural protections of § 1252a(d) in fighting deportation, while an alien charged with a minor crime could be deported under § 3583(d) without being afforded those same protections. Pet. Br. 24. As even the United States apparently recognizes, that position is without merit. A district judge may invoke the deportation provisions of § 3583(d) when sentencing *any* alien defendant to a term of supervised release, including felons subject to sentencing under § 1252a(d).

The United States raises a related objection to the Eleventh Circuit's interpretation of § 3583(d). It argues that Congress's adoption of § 1252a(d) with its numerous procedural protections for aliens facing possible judicial deportation would be a "useless act" if § 3583(d) were interpreted as permitting judicial deportation, and "Congress must not be presumed to have performed such a 'useless act' in enacting Section 1252a(d)." U.S. Br. 36-37 (quoting *Phommachanh,* 91 F.3d at 1387.

The Court need not address the applicability to this case of the "useless act" approach to statutory construction, because § 1252a(d) quite clearly applies to situations to which § 3583(d) is inapplicable and thus cannot possibly be described as a "useless act." The most significant difference between the two statutes is the nature of the judicial orders issued under each. Deportation orders issued under § 3583(d) are in the form of conditions imposed on terms of supervised release. If for whatever reason an alien defendant upon whom such a condition has been imposed fails to be deported following the completion of his prison term, the only recourse available to the district court is to revoke the term of supervised release pursuant to 18 U.S.C. § 3583(e)(3). The alien defendant then is re-

incarcerated and serves in prison all or part of his term of supervised release. In contrast, § 1252a(d) appears to contemplate that judicial deportation orders issued under that statute will be directly enforceable.

Another distinction between the two statutes is § 1252a(d)'s greater recognition of the role of the Executive Branch in judicial deportations. As the en banc Eleventh Circuit noted, § 1252a(d) provides Executive Branch with a vehicle for pursuing deportations through a judicial rather than an administrative proceeding, and provides an avenue for appeal (§ 1252a(d)(3)) from any order denying judicial deportation. *See United States v. Oboh,* 92 F.3d 1082, 1087 & n.7 (11th Cir. 1996)(en banc). In contrast, § 3583(d) does not create any formal mechanism by which the United States can seek deportation as a condition of supervised release, nor does it provide for appeal of a denial of such a condition.

Moreover, the existence of § 1252a(d) considerably bolsters the Eleventh Circuit's position that § 3583(d) authorizes district courts to order deportation as a condition of supervised release. Mr. Ogbomon and the United States argue repeatedly that Congress could not possibly have intended the Eleventh Circuit's interpretation of § 3583(d) because Congress has such a long-standing tradition of reserving deportation decisions for the Executive Branch. However, § 1252a(d) is proof positive that regardless of the

strength of any such tradition,[5] Congress is now willing to grant federal courts the authority to issue deportation orders to ensure the quick departure of aliens convicted of crimes. *See also* the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, which was enacted on September 30, 1996 and which (when it takes effect on April 1, 1997) will considerably broaden the power of district courts to issue judicial deportation orders.

In sum, since § 1252a(d) and § 3583(d) can be fully harmonized, the existence of § 1252a(d) does nothing to undercut -- and actually supports -- the Eleventh Circuit's construction of § 3583(d).

II. SECTION 3583(d) AS CONSTRUED BY THE ELEVENTH CIRCUIT DOES NOT VIOLATE PETITIONER'S DUE PROCESS RIGHTS

Mr. Ogbomon's certiorari petition did not raise any constitutional issues. Mr. Ogbomon now asserts (as do his two supporting *amicus curiae* briefs) that the Eleventh Circuit's interpretation of § 3583(d) should be avoided because, if adopted, it would raise serious questions as to the constitutionality of § 3583(d). Pet. Br. 25-27.

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[5] Mr. Ogbomon and the United States appear to have overstated their case considerably on this point. Case law they cite in support of their argument that district courts historically have been excluded from the deportation process stands for the proposition that the judiciary has no power to review (unless expressly authorized by law) Executive Branch decisions to *exclude* aliens from the United States, not that Congress has been hostile to the court playing a role in ensuring that undesirable aliens are excluded or deported. *See, e.g., United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 542-43 (1950).

Mr. Ogbomon's constitutional arguments are groundless. His principal argument appears to be that § 3583(d), as construed by the Eleventh Circuit, violates the equal protection component of the Fifth Amendment's Due Process Clause, by improperly distinguishing between classes of aliens. Mr. Ogbomon's contention that those distinctions should be subjected to "strict scrutiny" review (*id.* at 26) is without merit; cases cited by Mr. Ogbomon stand for the proposition that laws distinguishing aliens from citizens are sometimes subjected to strict scrutiny, not that laws distinguishing among different classes of aliens are subjected to such review. *See, e.g., Nyquist v. Mauclet,* 432 U.S. 1 (1977). Mr. Ogbomon's contention that § 3583(d) and § 1252a(d) arbitrarily distinguish among classes of felons by providing the most serious offenders with the most procedural protections against deportation (Pet. Br. 26) is based on a misreading of § 3583(d) and the Eleventh Circuit's decision: § 3583(d) is applicable to *all* alien defendants who are eligible to be sentenced to a term of supervised release, including alien defendants convicted of aggravated felonies.[6]

Mr. Ogbomon lacks standing to assert that § 3583(d) violates procedural due process rights regarding a district court's determinations that the defendant is an alien and is

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[6] The equal protection argument of *amici curiae* American Immigration Lawyers Association, *et al.*, is equally meritless. They argue that alien defendants sentenced within the Eleventh Circuit are denied equal protection because that court's interpretation of § 3583(d) is harsher on alien defendants than are the interpretations of other appeals courts. Brief at 22-24. Such inter-circuit splits regarding the meaning of a statute have never been held to rise to the level of an equal protection violation, and the distinction among defendants that *amici* complain of will be resolved as soon as this Court rules regarding the meaning of § 3583(d).

subject to deportation -- since Mr. Ogbomon does not contest the district court's findings that he is an alien and is subject to deportation. An assertion that district courts are unlikely to provide adequate procedural due process protections during § 3583(d) proceedings is, in any event, highly implausible -- since such proceedings arise in connection with the sentencing phase in a criminal case, an arena in which participants historically have received numerous procedural protections (including, *e.g.*, the right to counsel, the right to notice of potential sentences, the right to present evidence, and the right to appeal any sentence imposed). Such procedural protections more than satisfy the limited procedural due process rights to which aliens are entitled under the Fifth Amendment. *See, e.g., Reno v. Flores,* 113 S. Ct. 1439, 1449-51 (1993).[7]

Mr. Ogbomon is correct that § 3583(d), as construed by the Eleventh Circuit, denies him the opportunity to seek discretionary relief from deportation -- an opportunity normally available in administrative deportation proceedings. However, he has cited no case law that so much as suggests that the opportunity to seek such relief is a substantive right protected by the Due Process Clause. Moreover, as noted above, due to district courts' limited powers to enforce their § 3583(d) deportation orders, it is extremely unlikely that an alien ordered deported as a condition of supervised release would end up, for example, being deported to a country where he is likely to suffer political persecution. If an alien defendant demonstrated to the INS a valid asylum claim following a § 3583(d) depor-

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[7] WLF notes that the United States, while accepting Mr. Ogbomon's interpretation of § 3583(d), rejects out of hand his claim that the Eleventh Circuit's interpretation of § 3583(d) raises constitutional concerns. U.S. Br. 36 n.18.

tation order, the INS would likely decline to carry out the deportation, and the district court's sole recourse would be to revoke the term of supervised release pursuant to § 3583(e)(3). And, of course, such an alien defendant would be free to raise his asylum claims in connection with his sentencing proceedings.

III. IF PETITIONER'S CLAIMS ARE MOOT, LOWER-COURT DECISIONS ENTERED IN THIS CASE SHOULD NOT BE VACATED

As noted in the United States's brief, there is a serious possibility that this case was rendered moot by the district court's April 1996 revocation of Mr. Ogbomon's term of supervised release. The district court replaced that term of supervised release with a 12-month prison sentence, and gave no indication that the new prison sentence is to be followed by a new term of supervised release. Revocation of the term of supervised release would appear to revoke all conditions imposed on the supervised release, including the condition that Mr. Ogbomon be deported.

The government has speculated that the district court may have contemplated that the deportation order would survive revocation of the term of supervised release. U.S. Br. 6. However, § 3583(e)(3) imposes strict limits on the additional punishment that may be imposed on a defendant following revocation of his term of supervised release, and it is not at all clear that § 3583(e) permits imposition of a new term of supervised release following revocation of the original term. Since logic suggests that a deportation order imposed as a condition of supervised release would not survive revocation of the term of supervised release, there is little reason to believe that the district court views its deportation order as remaining in force.

Any claim that this case is not moot must rest on the August 29, 1996 sentence imposed on defendant by the U.S. District Court for the Northern District of Alabama. That sentence included, as a condition of supervised release to follow a 24-month term of imprisonment, that Mr. Ogbomon "shall be deported immediately upon completion of the term of imprisonment and shall remain outside the United States during the period of supervised release, in accordance with 18 USC 3583(d)." U.S. Br. 7 n.5. Given that Mr. Ogbomon raises the same objections to that sentence that he raises to the sentence imposed in the instant case, and given that his appeal from the Alabama sentence will have to come through the Eleventh Circuit (which has already rejected Mr. Ogbomon's statutory arguments in this case and would undoubtedly believe itself bound by its decisions in this case, *Chukwura*, and *Oboh* to reject his forthcoming appeal), prudence suggests that the Court rule on the merits of this case despite the apparent absence of a case or controversy between the parties at present. The current split among the courts of appeals regarding the meaning of § 3583(d) is unlikely to disappear on its own, and thus there is every reason to resolve the issue now in connection with a case in which the alien defendant has a very strong personal stake in the resolution of that issue.

If the Court decides to dismiss the case as moot, it should not disturb the decisions issued below by the district court and the Eleventh Circuit. As the Court held recently in *Anderson v. Green*, "[I]n deciding whether to disturb prior judgments in a case rendered nonjusticiable, we have inquired, pivotally, 'whether the party seeking relief from the judgment below caused the [nonjusticiability] by voluntary action.'" *Anderson v. Green*, 115 S. Ct. 1059, 1061 (1995)(quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall*

Partnership, 115 S. Ct. 386, 391 (1994)). If so, then vacatur is inappropriate.

The revocation of Mr. Ogbomon's term of supervised release was brought about by his voluntary actions. Because he voluntarily took actions that violated the terms of his supervised release (including engaging in criminal conduct in Alabama and remaining in the United States following his December 1994 release from prison), Mr. Ogbomon has nobody to blame but himself for the sequence of events that may have led to this case being rendered nonjudiciable. Accordingly, in the event that this case is dismissed on mootness grounds, *Anderson* and *Bonner Mall* dictate that the lower court decisions that were adverse to Mr. Ogbomon not be vacated.

In sum, WLF requests that the court address the merits of this case. But if the court decides to dismiss the case, it should leave intact the lower court decisions.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court affirm the judgment of the court of appeals.

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